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ABSTRACT

The Law Division of the proceedings contains the following 8 papers: "Trademarks and the First Amendment: The Anatomy of a Conflict" (Retha J. Martin); "Exit Polls and Other Bad Habits: An Analysis of First Amendment Considerations Concerning Policy Recommendations to Control or Prohibit Media Election Forecasts" (Niels Marslev); "Theory Rejected: The Framing of the Freedom of Expression Section of the South African Constitution" (Thomas A. Schwartz); "Protecting a Delicate Balance: Facts, Ideas, and Expression in Compilation Copyright Cases" (Matthew D. Bunker and Bethany White); "Online Privacy: A Comparative Study of Privacy Practices on European and American Web Sites" (Bastiaan Vanacker); "'An Evil Act': The Battle to Define Communication in 'Texas v. Johnson'" (David J. Vergobbi); "Redefining 'Internet Service Providers': Towards a New Legal Framework for Internet Regulation" (Seung Eun Lee); and "Localism Reconsidered: The Lessons of Docket 80-90 and Low Power FM" (Gregory D. Newton). (RS)

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Trademarks and the First Amendment: The Anatomy of a Conflict

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Trademarks and the First Amendment: The Anatomy of a Conflict

Introduction

Evolving technology, new legislation and trends in judicial thinking have contributed to changes in the area of trademark protection and policy with threads of First Amendment concerns woven throughout. The thesis of this paper is that developments in trademark protection have created a legal environment in which the rights of trademark owners are valued over First Amendment rights of free speech. In order to discern how First Amendment issues arise in relation to trademarks, it is necessary to understand the commercial function of a trademark and the two major theories for protection of trademarks, namely: 1) trademark protection against infringement under Section 43(a) of the Lanham Act,[1] and 2) trademark protection based on the federal dilution law as set forth in Section 43(c) of the Lanham Act.[2]

How a Trademark Functions

Trademarks are a form of commercial expression, hence, the Federal government's right to regulate trademarks arises under the Commerce Clause of the U.S. Constitution. The commercial process of producing, advertising and selling branded goods to meet consumer needs (or perceived needs) is the contextual background for this analysis of how trademarks represent.

Beginning in the early 1900's, the courts recognized that trademarks function as symbols that convey information regarding sources or origin of a product and its quality. Consistent with this concept, the Trademark Act of 1946 (the Lanham Act) provided the following legal definition of a trademark:

> The term 'trademark' includes any word, name, symbol, or device, or any combination thereof—
> (1) used by a person, or
> (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this Act,
> to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.[3]

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[1] Trademark Act of 1946, 15 U.S.C. §§ 1051-1127, 1127.

[2] Trademark Act of 1946, 15 U.S.C. § 1125 (c)(1) (as amended).

[3] 15 U.S.C. §§ 1051-1127, 1127.

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Trademarks can thus be seen to represent the physical and functional "aboutness" of a product, including: 1) the product characteristics or features, 2) the quality, and the 3) source . (manufacturer or retailer). Many modern marks represent "hugely informative data clusters" with regard to the attributes of goods.[4]

In his *Harvard Law Review* article in 1948, the marketing scholar, Ralph Brown, referred to this as the "informative function of trade symbols." He noted that this informative role of trademarks rarely exists independently of advertising.[5] The consumer experiences a trademark in the context of advertising, and the meaning of the trademark to the consumer is shaped by the advertising. Trademarks, thus, serve as identifiers for advertising and a trademark can be seen to represent present and past advertising messages.

Trademarks also represent psychological or emotional meaning associated with a product. Justice Frankfurter eloquently referred to this level of meaning and the communication role of trademarks in the Supreme Court opinion he wrote for *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.* in 1942:

> The protection of trade-marks is the law's recognition of the psychological function of symbols…A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—***to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears***… If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress. (emphasis added)[6]

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[4] Jerre B. Swann, Sr., David A. Aaker and Matt Reback, "Trademarks and Marketing," *Trademark Reporter* 91 (July/August 2001): 787-832, 796.
[5] Ralph S. Brown, Jr., "Advertising and the Public Interest: Legal Protection of Trade Symbols," *Yale Law Journal* 108 (1948): 1165 -1215, 1187.
[6] *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942).

The consumer shares a psychological association with the trademark so that it becomes an old friend with its own personality. Emotional attachments with the trademark lead to use experiences that have a high level of richness and depth. The psychological meaning that a trademark represents is reinforced through advertising.

However, if a trademark is limited to representing only a data cluster of product information plus psychological meaning, the trademark owner may find itself still struggling for commercial success in the current environment of merchandising and multi- faceted use of trademarks. Aggressive marketing strategists seek to create expanded meanings for their trademarks. This has led to the emergence of a new role of trademarks as a promise of a "self-expressive" or "transformative" experience. Consumers can enjoy a heightened sense of success by owning the product, can become a rebel or become more elegant, adventuresome or efficient. They can experience a change in their professional, social and personal personas because of their association with the trademark. For example, a MONTBLANC pen at a business meeting allows the user to experience feelings of success and confidence. The latest model of NIKE shoes instills a "hipness" in the teenager wearing the shoes on the street or in school. Driving a LEXUS automobile transforms the driver into a person with superiority and authority that may be decidedly different from the person they were before. Consumers may even buy a product purely for the prestige or status it confers with no interest in performance. For example, owners of KITCHENAID stand mixers in designer colors purchase the models for status accents in their kitchens, but rarely use them as evidenced by the lack of consumer inquiries or service calls for such products. The strongest trademarks are those that represent functional, emotional and self-expressive (or transformative) elements.[7] Consumers are more likely to purchase a product bearing a trademark that will meet multiple needs.

Robert N. Klieger asserts that most advertising is persuasive rather than informational, because marketers are seeking to create a set of intangible set of desirable associations that will foster return purchases and consumer loyalty.[8] A trademark performs a powerful new role when it can prompt consumers to achieve consumer realization of a self-expressive or transformational value from their association with the trademark. For "superbrands" this can become so important that the value of a trademark can exist independently of any specific product or service. It represents an entity of its own that communicates a desirable bundle of possibilities for consumers. The individual who purchases a lunchbox bearing the COCA COLA trademark or silk boxer shorts with the COCA COLA logo or a mouse pad with the COCA COLA arctic bear is making a consumer decision to buy the item for emotional or self-expressive reasons since the attributes of the beverage are irrelevant.

The commercial product transaction process is shown in Figure 1 below.

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[7] Swann, 797.

[8] Robert N. Klieger, Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection, *University of Pittsburgh Law Review* 58 (1997): 789-866, 856-857.

Figure 1
Commercial Product Transaction Process

Manufacturer	Product	Trademark + Advertising	Purchase Activity	Purchase	Consumer Needs
↓	↓	↓ ↓	↓		↓
Source or origin of trademarked goods	Attributes	↓ ↓ ↓ 1) Informational 2) Persuasive	1) Comparisons 2) Past experience 3) Advertising 4) Other decision-making factors		1) Physical 2) Psychological & emotional 3) Self-expressive & transformative

↓

The trademark represents:

1) *Physical/functional characteristics*
   "Data cluster" of attributes
   - Source
   - Product Features
   - Quality
2) *Psychological/emotional value* ►
   Cognitive "aboutness" of the trademark ►
   - Positive feelings, richness and depth of experience ► ►
3) *Self-expressive/transformative value* ►
   Cognitive "aboutness" of the trademark ►
   - Ability of the consumer who associates with the trademark to engage in positive self-expression and experience change. ► ► ►
4) *Advertising messages (past and present)*
5) *Financial asset of the trademark owner*

THE "TRADEMARK MANIFEST"

All characteristics, values, past and present ad messages, financial worth and "aboutness" that a trademark represents.

Where the relationship between trademark and consumer is extremely strong, the process skips the purchase activity and decision-making step as the consumer makes a purchase based strictly on the "Trademark Manifest." If the persuasive role is sufficiently strong, a consumer may buy a product for fashion, prestige or status that may not meet functional needs. An example is designer shoes that can barely be worn because they are so uncomfortable. In the reverse, a consumer may buy a product that provides far more functional needs than required, such as purchasing a JOHN DEERE riding lawnmower for a tiny lawn.

A trademark also represents a financial asset for a company. It can be valued on a capital assets sheet, can be subject to taxes and can be bought and sold. Well-known, famous trademarks are worth billions of dollars.

A company may choose to change the way in which its trademark represents the physical and cognitive meanings by introducing a new slogan, hiring a new spokesperson or using music and visual imagery. The amount of money spent on advertising and types of media used can dramatically affect whether the meaning of a trademark is broadly communicated and understood. (Formal valuations of trademark assets for various business purposes include how much is spent on advertising as part of their formula.) If the trademark owner cuts its advertising budget, consumers may begin to be less clear on the meaning of a trademark and previous advertising messages may fade.

Contextual Factors Influencing the Interpretation of the Meaning of Trademarks

Numerous societal, legal, institutional and corporate factors impact the interpretation of the meaning of trademarks. They may be initiated and controlled by the trademark owner itself or may be thrust on the trademark by external circumstances. External circumstances may include unforeseen events that are favorable (the 1987 spontaneous soaking of Superbowl Coach Bill Parcells with GATORADE drink that resulted in a windfall of promotional goodwill and a tradition for winning teams)[9] or unfavorable (the tampering with Tylenol drug bottles in 1982 that required Johnson & Johnson to engage in a large-scale nationwide recall and a dedicated effort to rebuild consumer confidence.)[10] The public's whole-scale adoption of a trademark as an everyday descriptive term could fall in this category of external circumstances. A politician or public interest group could also use a trademark that would be an external circumstance influencing the owner's ability to control its valuable "Trademark Manifest." An example would be use of the term "STAR WARS" by public interest groups in television ads regarding the Reagan administration's missile defense system.

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[9] See Sam Jaffe, "Do Pepsi and Gatorade Mix?," *Business Week Online* (August 14, 2001); par. 3; available from http://www.businessweek.com:/print/bwdaily/dnflash/aug…/nf20001081 4_156.htm; Internet, accessed 25 October 2001; Bob Molinaro, "Gatorade Shower Leaves Some With Sour Taste," Pilot Online Sports (January 19, 2001); par. 1; available from http://www.pilotonline.com/sports/sp0119mol.thml; Internet; accessed 25 October 2001. Richard Linde, "Think Gatorade;" (2001); par. 23; available from http://www.4malamute.com/Think_Gatorade.html; Internet; accessed 25 October 2001.

Another major group of external circumstances are the expressions of free speech that occur through parody of trademarks or their corporate owners, comparative advertising, media usage, news reports. ***To the extent any of these expressions of free speech are uncontrolled by the trademark owner and present a threat to its Trademark Manifest, the owner will utilize the panoply of legal means available to silence the speech.*** Make no mistake, in the present commercialized culture where trademarks represent the lifeblood of major corporations and millions of dollars are invested in developing Trademark Manifests, powerful owners will aggressively avail themselves of all legal remedies to maintain the integrity of such Trademark Manifests with disregard for broader issues of free speech and public policy. Several new trademark laws have been enacted that provide new enforcement options for the trademark owners and raise questions regarding whether First Amendment freedoms of speech will become sacrificial lambs in the name of trademark protection. The remainder of this paper will explore areas in which the protection of trademarks and Trademark Manifests are on a collision course with First Amendment freedom of speech.

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[10] See Jennifer Hogue, "Johnson & Johnson's Tylenol," (Spring 2001); par. 3; available from http://iml.jou.ufl.edu/projects/Spring01/Hogue/tylenol.html; Internet; accessed 25 October 2001; Tamara Kaplan, "The Tylenol Crisis: How Effective Public Relations Saved Johnson & Johnson," The Pennsylvania State University (1998); par. 45; available from http://www.personal.psu.edu/users/w/x/wxk116/tylenol/crisis.html; Internet; accessed 25 October 2001.

Emergence of the Property-Based Trademark

The scope of trademark protection has been expanding during the past twenty years. A Duke University law professor states that the Patent and Trademark office has been on a "binge of protectionism" most recently during the Clinton years.[11] One key area is the development of a property right in trademarks in contrast to the previous strict legal focus on protection against consumer deception. (The property theory is an integral part of the Dilution Act of 1995.) This trend is apparent in the broad licensing of trademarks as merchandising commodities. Commentators feel that this raises a wide range of legal and social risks in addition to the risk to First Amendment values. These include: 1) lost opportunities for important political and social commentary and works of are, 2) higher prices (when we protect the design of products as trademarks, we prevent competition in the sale of those products and the price goes up), 3) impact on language and culture when we cannot use familiar words to discuss, or make fun of, or criticize the products and companies that are the basis of our economy, 4) higher costs due to trademark licensing, and 5) reduction in certainty, making trademark searching and clearance more difficult and leading to more litigation.

There is a fundamental difference in applying the trademark laws to prevent consumer confusion and applying the trademark laws to prevent diminishment in the value of the trademark owner's property. The trend in the law (including the introduction of the Dilution Act of 1995) indicates that the latter approach has now been adopted and imperils First Amendment values.

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[11] James Boyle, "The Constitution Under Clinton: A Critical Assessment: The First Amendment and Cyberspace: The Clinton Years," *Law and Contemporary Problems* 63 (2000): 337.

Trademark Dilution Law: Overprotection of Trademarks and Underprotection of Free Speech

The lessening of free speech is one way in which society's interests are harmed by overprotecting intellectual property. A chill on free speech in the public domain results in less creativity and exchange of ideas. A line of cases has demonstrated that the courts have been liberal in privileging the property rights of trademark owners over individual rights of expression. They have failed to "balance the constitutionally protected rights in property with the constitutionally protected right of freedom to individual expression."[12] This section will provide background information on the Federal Trademark Dilution Act and then explore the cases that afford trademark property rights greater protection than First Amendment rights.

a. Federal Trademark Dilution Act of 1995

The traditional theory of trademark enforcement is based on the notion that relief should be granted to those injured by trademark infringement solely on the basis of sufficient evidence that consumers are likely to experience confusion. This theory is codified in a section of the Trademark Act of 1946 (the Lanham Act), commonly referred to as "Section 43 (a)." The provisions of this section entitle a trademark owner to recover against use in commerce of trademarks that are "likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association…"[13]

The established body of trademark law was significantly expanded in 1995, with the enactment of the Federal Trademark Dilution Act, a statute which introduced the Federal remedy of trademark dilution. Pursuant to this Act, trademark owners are entitled to redress against "another person's commercial use in commerce of a mark or trade name, if such use begins after the mark becomes famous and causes dilution of the distinctive quality of the famous mark."[14] The statute lists eight factors for consideration in determining whether a trademark is "distinctive and famous."[15] A company engaged in selecting and adopting new trademarks must now be wary of trademark dilution claims from third parties who need only convince a court that their trademarks qualify as famous and distinctive and that they have suffered loss due to the other company's use in commerce of a mark that "causes dilution of the distinctive quality of the famous mark."[16]

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[12] Keith Aoki, "Using Law and Identity to Script Cultural Production: How the World Dreams Itself to be American: Reflections on the Relationship Between the Expanding Scope of Trademark Protection and Free Speech Norms," *Loyola of Los Angeles Entertainment Law Journal* 17 (1997) 523-547, 536.
[13] 15 U.S.C. § 1125 (a).

The innovative theory of trademark dilution was not a new concept in the 1990s. It was launched in 1927 by Frank Schechter, a New York trademark attorney, in his seminal *Harvard Law Review* article, "The Rational Basis of Trademark Protection."[17] Schechter argued that trademarks meeting the standard of distinctiveness or uniqueness (he described them as "coined or fanciful") should receive broader protection than that offered by traditional trademark law which is governed by principles of consumer confusion and based upon a showing of likelihood of confusion.[18] His trademark dilution theory was concerned only with the loss of a trademark's distinctiveness irrespective of likelihood of confusion, and the trademark owner was entitled to stop damaging uses on unrelated and noncompeting goods. This concept was adopted by the courts and developed through common law. It was eventually codified into various state statutes, finally gaining national prominence with adoption of the Federal Dilution Act of 1995.

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[14] 15 U.S.C. § 1125 (c)(1).

[15] These include:

(A) the degree of inherent or acquired distinctiveness of the mark,
(B) the duration and extent of use of the mark in connection with the goods or services with which the mark is used,
(C) the duration and extent of advertising and publicity of the mark,
(D) the geographical extent of the trading area in which the mark is used,
(E) the channels of trade for the goods or services with which the mark is used,
(F) the degree of recognition of the mark in the trading areas and channels of trade of the mark's owners and the person against whom the injunction is sought,
(G) the nature and extent of the use of the same or similar marks by third parties, and
(H) the existence of a registration under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register. Ibid.

[16] 15 U.S.C.A. § 1125(c).

[17] Frank I. Schechter, "Rational Basis of Trademark Protection," 40 *Harvard Law Review* 813 (1927).

[18] Trade-Mark Act of February 20, 1905, as amended by the Acts of January 8, 1913 and March 19, 1920. 33 Statutes at Large (1905), 15 U.S.C.A. § 85 (1927).

Trademark dilution can be viewed as a phenomenon that is closely connected with brand equity. A broad definition of brand equity is " a set of brand assets and liabilities linked to a brand, its name and symbol, that add to or subtract from the value provided by a product or service to a firm and/or to that firm's customers."[19] So trademark dilution can be interpreted economically as a "reduction in brand equity."

There are sharp differences between Section 43(a) and the new Federal trademark dilution law, including fundamental differences in underlying public policy. The law of Section 43(a) is based on the need to protect the trademark owner's rights in the goodwill in its trademarks and the equally important right of the public to be protected against confusion, deception and mistake. In contrast, the Trademark Dilution Act serves to protect the distinctiveness of a famous mark against dilution (diminution in the mark's reputation through blurring or tarnishment of the mark) regardless of any showing of likelihood of confusion. A trademark owner could thus prevail in a pure dilution claim that would result in no discernable public benefit.

In the course of the past seven years since Congress passed the Federal Trademark Dilution Act, the new law has remained highly controversial as trademark owners, trademark lawyers and the judiciary have struggled to integrate the concept of trademark dilution into the body of existing trademark law. The courts in various Federal jurisdictions have interpreted the law inconsistently with regard to whether a mark is famous and distinctive and whether the injured party has sufficiently demonstrated a blurring or tarnishment of trademark rights.[20]

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[19] Alexander F. Simonson, "How and When Do Trademarks Dilute: A Behavioral Framework to Judge 'Likelihood of Confusion,'" *Trademark Reporter* 83 (1993): 149-162, 151; quoting David A. Aaker, *Managing Brand Equity* (1991), 15.

The trademark commentator, Jerry Gilson, and his co-author, Anne Gilson LaLonde, emphasizes in their trademark treatise that the "distinctiveness" element must be proven to succeed in a famous mark to claim dilution.[21] It is the distinctiveness element that is damaged by blurring ("whittling away" of rights) or tarnishment (diminution of the value of the mark or loss of business reputation through negative or inferior usage).

This troubles First Amendment proponents who see chilling effects on speech resulting from the treatment of trademarks as products rather than information sources and the discretionary interpretations of "famous marks." They believe that dilution legislation reduces the free exchange of ideas and information that can occur through parody and criticism of famous companies. On the other hand, the trademark community espouses the view that famous marks are "fragile assets that are susceptible to irreversible injury from promiscuous use."[22]

The dilution theory assumes a trademark is property or "information as thing" rather than an "information and communication source" for consumers. As noted earlier in this paper, the traditional purpose served by trademark laws in preventing consumer deception with regard to source or origin is subservient to the goal of protecting the trademark owner's valuable asset.

In addressing a potential violation of the dilution law, the emphasis is currently on analyzing dilution of the brand's meaning with regard to product and source (the "data cluster" referenced earlier in this paper.) Given the expanded scope of information and meanings represented by trademarks today, a trademark can represent many meanings that extend well beyond and exist independently from its source and the product that defined its market entry. Scholars representing the interests of the trademark owners have argued that the courts should consider "maintaining the mark's communicative clarity in full, not on preserving the power of its link to a singly-made good."[23] This will require courts will need to develop and apply new techniques to better understand the meaning of marks (which is critical to understanding their distinctiveness) before determining whether blurring or tarnishment to the marks has occurred.

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[20] For example, the Fourth Circuit and Fifth Circuits have applied a strict interpretation of the Dilution Act, requiring proof of actual dilution as a prerequisite for relief. The Second Circuit is willing to rely on circumstantial evidence of dilution. The Seventh Circuit has taken the position that actual proof of dilution would present plaintiffs with an "impossible level of proof." See Jerome Gilson and Anne Gilson LaLonde, *Trademark Protection and Practice*, vol. 2, § 512(1)(b) (New York: Lexis Publishing, 1974, last update May 2001): 5-312.2 - 5-312.4.

[21] Jerome Gilson and Anne Gilson LaLonde, *Trademark Protection and Practice*, vol. 2, § 512(1)(c)(ii) (New York: Lexis Publishing, 1974), last update May 2001.

[22] Trademark Review Commission Report and Recommendations to USTA President and Board of Directors, *Trademark Reporter* 77 (1987): 375-479, 455.

b. The Courts Afford Trademark Rights Greater Protection than First Amendment Rights

The underlying premise of dilution has always agitated First Amendment scholars and created controversy in the courts. There is evidence to show that federal dilution law can be a convenient vehicle for controlling content without meeting the usual rigors of a trademark analysis. Critics are asking how trademark owners can be stopped from using anti-dilution statutes to prevent the exercise of constitutionally protected speech.

In *Coca Cola v. Gemini Rising, Inc.*,[24] an early dilution case decided under the New York anti-dilution statute in 1972, the Eastern District of New York recognized the trademark rights of the Coca Cola Company in granting it an injunction against the producers of a poster that stated "Enjoy Cocaine" in the same stylized script used by Coca Cola in its advertising. In fact, Coca Cola had historically used a derivative of coca leaves in its beverage prior to 1906. The ant-dilution laws were used to protect the Coca Cola Company's trademark interests from a negative association even when the negative association was imbued with an element of truth.

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[23] Jerre B. Swann, Sr., "Dilution Redefined for the Year 2000," *Houston Law Review* 37 (2000): 729-774, 772.
[24] *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1193 (E.D.N.Y. 1972).

The Eighth Circuit demonstrated its choice of trademark property law over free speech in *Mutual of Omaha Ins. Co. v. Nova*).[25] This 1987 case involved defendant's use of "Mutant of Omaha" together with a graphic of an emaciated human head with a feather headdress on a variety of merchandise promoted and sold via exhibitions, fairs, television and print media. As additional commentary, the defendants also imprinted the words "Nuclear Holocaust Insurance" on T-shirts originally marketed with the other slogan and graphic. The Court rejected all consideration of a First Amendment defense on the grounds that there were alternative means not prohibited by the injunction by which the defendant could express his views.

Another case decided by the Eighth Circuit seven years later shows the same indifference to First Amendment concerns. In ***Anheuser-Busch, Inc. v. Balducci Publications***,[26] a low budget tabloid called *Snicker* featured a parody related to Anheuser-Busch's halting the manufacture of its beer for some time due to the contamination of its water supply by a rupture in a Shell Oil pipeline. The Spring 1989 issue of *Snicker* featured a bogus advertisement on its back cover that included a combination of photos and words about a beer named "Michelob Oily." [27] The ad showed a hand holding a can of beer with an oil spout that was overflowing oil onto a fish. In a parody of the Anheuser-Busch slogan "One drink and you'll drink it dry," the ad featured the slogan "One taste and you'll drink it oily."[28] Other elements of the ad included a Shell Oil logo at the bottom of the ad and an Anheuser Busch Eagle logo that showed the eagle covered in oil exclaiming "Yuck."[29] The following statement appeared at the bottom of the bogus ad: "At the rate it's being dumped into our oceans, lakes and rivers, you'll drink it oily sooner or later anyway." In an effort to clarify the nature of the ad, the ad included the following disclaimer in the right margin: "Snicker Magazine Editorial by Rich Balducci, Art by Eugene Ruble."[30] The Court first analyzed whether the similarity between the bogus ad (labeled by the tabloid as an "editorial") and a real Michelob ad were sufficiently similar to create a likelihood of confusion. Finding this to be the case, the Court then determined that the trademark law's objective of avoiding consumer confusion outweighed any social commentary that the Snicker tabloid sought to express.[31]

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[25] *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397 (8th Cir. 1987).
[26] *Anheuser –Busch, Inc. v. Balducci Publications*, 28 F.3d 769 (8th Cir. 1994).
[27] Ibid., at 722.
[28] Ibid.
[29] Ibid.

The Supreme Court's holding in *Lloyd Corp. v. Tanner*[32] that the owner of real property is entitled to exclude picketers from such property has been improperly relied upon as precedent in trademark free speech cases. The analogy opens the door to the concept that regulating the content of expression is no more than a regulation of the time, place and manner in which it is communicated. In an article foreshadowing the First Amendment issues that would arise more visibly in the late 1990's, Robert Denicola noted the constitutional concerns inherent in the notion of trademark misappropriation in the absence of likelihood of confusion. He commented:

> The danger in utilizing a property conception of trademark…goes beyond its inadequacies as a descriptive theory. When adopted, it inevitable assumes a normative role, producing a mode of analysis incapable of transcending doctrine, thus precluding a rational consideration of competing social, economic, and occasionally, constitutional, interests.[33]

A 1987 case that demonstrates the Supreme Court's willingness to privilege trademark ownership over First Amendment rights based on the questionable time, place and manner analogy is *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee.*[34] The case arose when the U.S. Olympic Committee (USOC) sought to stop a gay advocacy group from sponsoring the "gay Olympic games." The USOC relied upon the Amateur Sports Act, a statute that grants the USOC the exclusive right to use the name "United States Olympic Committee", the Olympic symbol with interlocking rings, the words "Olympic", "Olympiad" and "Citius Altius Fortius" or any combination of these marks in a way that would "tend to cause confusion or mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity."[35] The Supreme Court upheld the trademark rights of the USOC and enjoined the advocacy group's use of the word "Olympic." In response to the advocacy group's First Amendment claims, the Supreme Court argued that prohibiting use of the word "Olympic" in the name "gay Olympic games" would not prevent the advocacy group from expressing a political statement about the status of homosexuals in society because ***the statute only restricted the manner in which the message was delivered.***[36]

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[30] Ibid.
[31] Ibid. at 777.
[32] *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).
[33] Robert C. Denicola, "Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols," *Wisonsin Law Review* (1982): 158, 165.
[34] *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee,* 483 U.S. 522 (1987).

Justice Brennan wrote a sharp dissent in which he argued that the restriction the majority placed on use of the word "Olympic" was a restriction on the content of the message and not merely a limitation on the time, place and manner in which the message was communicated. The advocacy group's objective was "to promote a realistic image of homosexual men and women that would help them move into the mainstream of their communities"[37] and the injunction prevented use of a word ("Olympic") for which there was no adequate substitute. Brennan took his position a step further and posited that the First Amendment affords protection for speech broader than a mere translation since a translation would never be able to fully express the original. He offers an explanation of how words constitute a combination of mixed fact and value that make it impossible to reduce them to other terms or substitute definitions.[38]

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[35] Amateur Sports Act, 36 U.S.C. 380 § 110 (1994).
[36] *San Francisco Arts & Athletics, Inc.* at 535-542.
[37] Ibid. at 569.
[38] Ibid. at 569 and 570, no. 33.

The Supreme Court's opinion in the *San Francisco Arts & Athletics* case is inconsistent with its earlier 1971 opinion in *Cohen v. California*[39] in which it recognized that restricting the use of certain words raised a risk of censoring expressive content. The case involved the free speech rights of an individual who was arrested for wearing a jacket bearing the phrase "Fuck the draft." In a 6-3 ruling recognizing that this was conduct that qualified as speech, Justice John Marshall Harlan held:

> We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able…to discern little social benefit that might result from running the risk of opening the door to such grave results.[40]

As noted earlier in this paper, commercial symbols or trademarks have become tightly knit into the fabric of our culture and are increasingly used in public discourse and communication. A number of legal scholars have addressed the importance of allowing trademark words and symbols to be used by non-trademark owners without fear of censorship of content. In 1993, Alex Kozinski aptly captured the growing importance of trademarks as a means of expressive communication when he observed the following: "…trademarks are the emerging lingua franca: with a sufficient command of these terms, one can make oneself understood the world over."[41] More recently, Keith Aoki argued: "Trademarks, as language, properly belong to the people, and just as words are not interchangeable, one symbol is not interchangeable with another, or with a collection of words."[42] Aoki asserts that the use of trademarks in communications should be permitted if the trademark is "an integral part of the message being conveyed."[43]

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[39] *Cohen v. California*, 403 U.S. 15 (1971).

[40] Ibid. at 26.

[41] Alex Kozinski, "Trademarks Unplugged," *New York University Law Review* 68 (1993): 960, 977.

[42] Aoki, 542.

The solution for the courts is to adopt a balancing approach that equally considers the constitutional rights of free speech under the First Amendment and property and due process concerns under the Fifth Amendment. Two important cases reflect this approach. Both resulted in a refusal to enjoin the trademark speech at issue.

In a case involving a risqué parody of the L.L. Bean catalog, the well-respected catalog company sought a temporary restraining order in 1984 to remove a two-page article from circulation in *High Society*, a monthly publication featuring adult erotic entertainment The article was entitled "L.L. Beam's Back-to-School-Sex-Catalog." L.L. Bean objected to the presentation of a facsimile of its trademark in the article alongside nude models in sexually explicit poses using certain crudely described "products." The First Circuit staunchly refused to apply Maine's anti-dilution statute against the noncommercial parody of L.L. Bean's trademark on the grounds that "trademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view." [44] Since the magazine used the L.L. Bean mark solely to identify the object of a parody and not to identify or market goods or services, Drake Publisher's First Amendment rights would be violated if the temporary restraining order was granted This well-reasoned decision provides that the First Amendment rights cannot be summarily dismissed because a trademark owner asserts that its property rights supersede free speech rights.

Another case that demonstrates recognition of the importance of balancing First Amendment concerns when the trademark is used in the expression of ideas is *Lucasfilm Ltd. v.*

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[43] Ibid.

[44] *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 29 (1st Cir. 1987), citing *Lucasfilm Ltd. v. High Frontier*, 622 F. Supp. 931, 933-935 (D.D.C. 1985)).

High Frontier.[45] The Lucasfilm production company brought an action before The U.S. District Court for the District of Columbia seeking to bar the use of its STAR WARS trademark in television advertisements by various public interest groups. The advertisements expressed different views relative to the Reagan administration's "Strategic Defense Initiative." Lucasfilm presented three rationales for relief to the court including likelihood of confusion, dilution and misappropriation. The court rejected all three based on its assessment that a trademark's limited property rights did not encompass the right to prohibit the use of protected words in all contexts. In concluding that the use of STAR WARS in the ads was protected expression, the Court cited the fact that the sole activity was the communication of ideas by the public interest groups and courts "cannot regulate the type of descriptive, non-trade use involved here without becoming the monitors of the spoken or written English language."[46] Moreover, the opinion recognized that even if Lucasfilm had evidence to support likelihood of confusion or dilution by weakening the strength of the mark, "[I]t would be wholly unrealistic and unfair to allow the owner of a mark to interfere in the give-and-take of normal political discourse."[47]

Another example of the balancing approach is the Second Circuit's decision in a parody case decided in 1989, *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*[48] Plaintiff, Cliffs Notes, filed a claim based on state dilution to enjoin defendant, Doubleday, from publishing a parody called "Spy Notes." The Second Circuit argued that it was unlikely that a consumer would believe that Cliffs Notes published "Spy Notes" as a study guide and held in favor of Doubleday. In balancing the First Amendment and potential consumer confusion, the court concluded that the public's rights of free expression prevailed.

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[45] *Lucasfilm Ltd. v. High Frontier*, 622 F. Supp. 931 (D.D.C. 1985).
[46] Ibid. at 935.
[47] Ibid.
[48] *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490 (2d Cir. 1989).

Parody and the First Amendment Under the Federal Trademark Dilution Act

Clashes between trademark owners and those who use trademarks in parodies are inevitable. The trademark owners respond frequently with legal actions because they are concerned that the public will believe the point of the parody as presented. The parodists feel entitled to share with the public their expression of a spoof on a trademark owner or trademark itself.

Under the Federal Trademark Dilution Act, an aggrieved trademark owner can successfully establish a case against a parodist by showing three elements: 1) the trademark at issue is a famous mark, 2) defendant has used the trademark in a commercial manner in commerce, and 3) the defendant has caused dilution of the mark (reducing the value of the trademark by undermining its selling power through tarnishment, blurring and diminishment).

All three of these elements leave considerable room for interpretation. With regard to the first, a parody can involve editorial or artistic messages and fall within the realm of commercial speech. There is a strong concern that corporate trademark owners are exerting heavy pressure on the courts to exploit the Lanham Act in preventing legitimate parodies and satirical comments on their trademark assets. This is especially an issue if the parody is of the trademark itself. parodies contribute to the pool of free speech by providing entertainment plus social commentary.[49]

Several parody cases decided since the enactment of the new Federal dilution act illustrate the range of opinions being rendered by the lower courts with regard to the interpretation of the dilution cause of action and the application of First Amendment principles. These include the following:

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[49] See Natalie A. Dopson, "The Federal Trademark Dilution Act and Its Effect on Parody: No Laughing Matter," *Journal of Intellectual Property Law Association* 5 (Spring 1998): 539.

- *Charles Atlas, Ltd. v. DC Comics, Inc.*, 112 F. Supp. 2d 330 (S.D.N.Y. 2000)[50] – Comic book manufacturer published a parody of the Charles Atlas advertisment for bodybuilding courses. The parody consisted of a comic strip story entitled "the Insult that Made a Man out of Mac." The Court held that the comic strip parody did not dilute Plaintiff's trademark rights in the advertisement because the parody was protected by the First Amendment.

- *Mattel, Inc. v. MCA Records, Inc.*, 28 F.Supp. 2d 1120 (C.D. Cal 1998)[51] – A musical group's song entitled Barbie Girl did not dilute plaintiff's BARBIE mark because it falls within the non-commercial use exception of the statute.

- *Elvis Presley Enters., Inc. v. Capece,* 950 F. Supp. 783 (S.D. Tex. 1996) [52] – The trademark ELVIS and ELVIS PRESLEY were used by THE VELVET ELVIS bar and restaurant lounge in Texas. Its décor displayed paintings of nude women in explicit poses. The plaintiffs unsuccessfully argued dilution by tarnishment. In holding that no tarnishment existed, the court stated: "[T]he nude pictures and the bar's intentional tackiness are an obvious part of the parody and are associated, to the extent any association is made, for purposes of the parody only, rather than for creating a permanent derogatory connection in the public's mind between the two businesses."[53]

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[50] *Charles Atlas, Ltd. v. DC Comics, Inc.*, 112 F. Supp. 2d 330 (S.D.N.Y. 2000).
[51] *Mattel, Inc. v. MCA Records, Inc.*, 28 F.Supp. 2d 1120 (C.D. Cal 1998).
[52] *Elvis Presley Enters., Inc. v. Capece,* 950 F. Supp. 783 (S.D. Tex. 1996).
[53] Ibid. at 799.

- *American Dairy Queen Corp. v. New Line Prods., Inc.*, 35 F. Supp.2d 727 (D. Minn. 1998)[54] - Dairy Queen has filed an action for dilution by tarnishment against New Line's use of "Dairy Queens" for a film that contains off-color humor and content. The court held that Dairy Queen is likely to prevail on its claim. Even thought the film's expressive content might be noncommercial, the film title is predominantly commercial, being used to market , advertise or identify the film. Therefore, the noncommercial use exception of the Dilution Act does not apply. The First Amendment is not a bar to injunctive relief because New Line has alternative avenues for expressing its idea.

- *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 924 F. Supp. 1559 (S.D. Cal. 1996), *aff'd,* 109 F.3d 1394 (9th Cir. 1997)[55] – The publisher of the well-known children's books brought a dilution action against the publisher, authors and illustrators of *The Cat Not in the Hat! A Parody by Dr. Juice.*, The parody was based on the O.J. Simpson scandal and its creators argued that it was not covered by the Federal Trademark Dilution Act because the use of the trademarks was non-commercial. The Court agreed, holding that the parody was exempt under the exception in the Dilution Act for noncommercial, expressive uses (15 U.S.C. § 1125 (c) (4)(B)). The court stated: "…the First Amendment would apply to this use of the trademarks at issue, and that as an expressive use, this use is exempt from the reach of the Federal Trademark Dilution Act."[56]

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[54] *American Dairy Queen Corp. v. New Line Prods., Inc.*, 35 F. Supp.2d 727 (D. Minn. 1998).
[55] *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 924 F. Supp. 1559 (S.D. Cal. 1996), *aff'd,* 109 F.3d 1394 (9th Cir. 1997)
[56] Ibid. at 1574.

In a recent conference presentation, a recognized lawyer and scholar on the subject of dilution, Miles Alexander, acknowledged the inherent issues in interpreting the statute and stated that it "may not be a panacea for trademark owners."[57]

First Amendment Rights to Use Cultural Icons

An argument has been raised that the rights in "cultural icons" should be preempted by First Amendment rights. One law student author, Steven Cordero, has taken this position with regard to trademarks that rise to the level of cultural icons (i.e., COCA-COLA and BARBIE) and legendary celebrities such as ELVIS PRESLEY.[58] Another author, Douglas Ellis, focused on the need for society to "synthesize and criticize its shared cultural symbols and signifiers."[59]

Why is Corporate America Implicated?

There is a consensus by scholars writing on the topic of trademarks and the First Amendment that when the law "protects the exclusive right of trademark owners at the expense of the non-owners, there will be an increasingly smaller group of individuals or corporations dictating how self is constructed."[60] The common understanding of language and parameters of cognitive concepts will often be determined within the frameworks of the Trademark Manifests that have become part of the consciousness of society (see discussion of Trademark Manifests at pages 5-7, infra.). This increasingly commercial culture will be heavily influenced by those who have the financial ability to legally control words and symbols. Rosemary Coombe has summarized this by stating that anti-dilution laws are "the perfect tool for corporate overreaching" when applied to

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[57] Miles J. Alexander and James M. Amend, "Recent Cases Under the Federal Dilution Act: Dilution Law in Development, An Unfinished Portrait," Unpublished Manuscript, distributed at International Trademark Association Mid-year Meeting, Naples, Florida (November 9, 2001): 5.

[58] See Steven M. Cordero, "Cocaine-Cola, the Velvet Elvis, and Anti-Barbie: Defending the Trademark and Publicity Rights to Cultural Icons," *Fordham Intellectual Property, Media and Entertainment Law Journal 8* (1998): 599.

[59] Douglas E. Ellis, "The Right of Publicity and the First Amendment: A Comment on Why Celebrity Parodies are Fair Game for Fair Use," *University of Cincinnati Law Review* 64 (1996): 575.

[60] Aoki, 546.

"preclude the use of a trademark in noncompeting contexts in ways that have no potential to confuse consumers."[61] In a similar disturbing conclusion, another commentator notes: "[I]ncreasingly, the only institute that is allowed to impregnate text with meaning is Corporate America." [62]

This suggests that the courts, legal scholars and the public should be sensitive to the need to diligently defend free speech values in a society increasingly focused on the commercial symbols -- symbols that may be overly protected by means of a new trademark dilution law that allows the control of content in a manner not previously possible.

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[61] Rosemary J. Coombe, "Authorial Cartographies: Mapping Proprietary Borders in a Less-Than-Brave New World," *Stanford Law Review* 48 (1996): 1357, 1366.
[62] Aoki, 546.

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Law

Exit Polls and Other Bad Habits:
An Analysis of First Amendment Considerations Concerning Policy Recommendations to Control or Prohibit Media Election Forecasts

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Abstract

Niels Marslev, Arizona State University, "Exit Polls and Other Bad Habits: An Analysis of First Amendment Considerations Concerning Policy Recommendations to Control or Prohibit Media Election Forecasts."

Following the media debacle on Election Night 2000, the National Commission on Federal Election Reform recommended that exit polling and early projections be discouraged or restricted. Existing jurisprudence, however, is rather unclear. This paper analyzes the cautious recommendations of the Commission primarily in light of First Amendment considerations. The author agrees with the recommendations, but also concludes that new restrictions, if challenged, would present the Supreme Court with a welcome opportunity to clarify ambiguous areas of media law.

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Exit Polls and Other Bad Habits: An Analysis of First Amendment Considerations Concerning Policy Recommendations to Control or Prohibit Media Election Forecasts

Background

In February of 2001, television network executives vowed before a congressional investigative hearing to make changes in their election night coverage. This solemn promise, of course, followed the infamous media debacle on Election Night 2000—still sufficiently fresh in memory to spare rehashing. As had been the case in previous network statements, the promises were few and rather vague, but the network execs did reach agreement on one thing: They will not again call a state in future presidential elections before all the polls in that state have closed.[1] One concession many observers had hoped for, however, was not granted. None of the networks promised to abstain from using the Voter News Service [VNS] compilation of exit polls, nor, of course, from relying on election forecasts altogether.[2]

In the absence of such voluntary abstention, is it feasible, then, within the confines of the First Amendment, to prohibit or limit media election projections legislatively? This analysis, while not attempting to resolve whether media forecasts *should* be curbed, explores the constitutional underpinnings of that intriguing judicial and political quandary. While the focus of the analysis is on media forecasts generally, most emphasis will be devoted to the controversial practice of exit polling.

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[1] *Election Night Coverage by the Networks: Hearing Before the House Committee on Energy and Commerce*, 107th Congress (2001) [hereinafter *Hearing*].

[2] Ted C. Savaglio, the executive director of the Voter News Service, did, however, announce various intentions to improve the methods of the VNS exit polls in future elections. *See* Christopher Sherman, *TV execs consider election night changes* (Week of Sept 4 through 10, 2001) <http://ajr.newslink.org/ajrchrisjan01.html>

Election forecasting is not of recent origin, nor is the public criticism of its practice. Serious objections were first raised in the early 1980s when Ronald Reagan's landslide victories over Jimmy Carter and Walter Mondale were attributed partly to the fact that the networks declared him the runaway winner hours before the polls closed in the West.[3] Many were concerned that, although Reagan certainly could not have been toppled in either election, the early prediction of his victory may have caused voters to pass up their chance to cast ballots for important local races and state referenda and initiatives. Whether swift election forecasts based on early tallies or exit polls actually have such effects seems to be a matter more of belief than of solid research.[4]

As for Election 2000, at least three prompt studies were performed to estimate whether there was a decline in voter participation in the Florida Panhandle, which is in a time zone one hour behind the rest of the state. One survey estimated that the early call discouraged slightly more Republicans than Democrats from going to the polls. Another study estimated the total drop-off at about three percent, again with more Republicans. And a third preliminary estimate found that 19,000 Florida voters were "disenfranchised," a substantial majority of these ostensibly being Republican voters.[5]

Until Election 2000, however, the critique of election forecasts—primarily of exit polling—appears to have come mainly from disgruntled Democrats and other groups suspecting that the release of early projections had harmed their cause.[6] The lack of prior public outcry is understandable if the VNS is correct in its claim to have been correct in 99.8 percent of its projections.[7] Still, as VNS Director Ted Savaglio succinctly noted, "… when you make a mistake as glaring as calling Al Gore the winner in Florida, the number of times you have been right seems less relevant."[8] To be sure, discussions concerning election forecasts, at least as gauged by media attention, increased greatly following Election 2000.[9] Consequently, several observers predicted and often welcomed the eventual demise of projections based on exit polling,[10] calling such forecasts, for instance, "the biggest problem on election night."[11] Others, predictably, rushed to the defense of exit polling,[12] finding it necessary to remind audiences that "… exit polls provide a lot of valuable information."[13]

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[3] *See* Lawrence K. Grossman, *Exit Polls, Academy Awards, and Presidential Elections*, COLUM. JOURNALISM REV., May-June 2000, at 70.

[4] *See id.*; Michael X. Delli Carpini, *Scooping the Voters? The Consequences of the Networks' Early Call of the 1980 Presidential Race*, 46 J. POL. 866 (1984); J. Ronald Milavsky et al., *Early Calls of Election Results: Pros, Cons, and Constitutional Considerations*, 49 PUB. OPINION Q. 1 (1984); Seymour Sudman, *Do Exit Polls Influence Voting Behavior?*, 50, PUB. OPINION Q. 331 (1986).

[5] *Federal Election Practices and Procedures: Hearing before the Senate Comm. on Gov't Affairs*, 107th Congress (2001) (testimony of Daniel B. Perrin, Executive Director, Committee for Honest Politics).

[6] *See* Warren J. Mitofsky, *A Short History of Exit Polls*, *in* POLLING AND PRESIDENTIAL ELECTION COVERAGE 83 (Paul J. Lavrakas & Jack Holley, eds., 1991).

Sounding the death knell, Richard Morin of the *Washington Post* prophesied that it was "only a matter of time before Congress … maneuvers to kill off exit polling for good."[14] In his words, "Exit polling, at least as we know it, is all but dead, mortally wounded by a handful of irresponsible news organizations …."[15] One question, then, begs to be asked: Can Congress, in fact, "kill off exit polling for good?"

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[7] *Hearing*, *supra* note 1 at 90 (testimony of Ted Savaglio, Director, Voter News Service).

[8] *Id.* at 90.

[9] A comparison of the number of newspaper stories with references to "exit poll" in the month following Election Day 2000 and that following Election Day 1996 showed an increase of more than 60 percent. Search of LEXIS-NEXIS Academic Universe, Arizona State University (Nov. 2001).

[10] *See* Mark Hosenball & Lynette Clemenson, *The Night of Bad Calls: Why This Razor-Thin Election Confounded the Number Crunchers and the Networks*, NEWSWEEK, Nov. 20, 2000, at 17; James Ledbetter, *Webwatch … Should Voter Data Be Released? New Media, Old Media Disagree*, COLUM. JOURNALISM REV., May-June 2000, at 71; Alicia C. Shepard, *How They Blew It: A Behind-the-Scenes Look at the Television Networks' Dismal Performance on Election Night*, AM. JOURNALISM REV., Jan.-Feb. 2001, at 20.

[11] *Exit Poll, Stage Left*, CHRISTIAN SCI. MONITOR, Dec. 8, 2000, at A10.

[12] *See* Ledbetter, *supra* note 10; Michael Kinsley, *Democracy Hypochondria: A Presidential Commission Endorses a Nutty Complaint* (Aug. 2, 2001) < http://slate.msn.com/?id=112969 >.

[13] Daniel Schorr, *Exit Polling: Why Gag the Media?*, CHRISTIAN SCI. MONITOR, Mar. 3, 2000, at A11.

[14] Richard Morin, *Why Exit Polls Face Extinction: Blame the Arrogance of the Media and the Anarchy of the Net*, WASH. POST, Mar. 6, 2000, at A19.

[15] *See id.*

The National Commission on Federal Election Reform

Acting in part upon such sentiments, the National Commission on Federal Election Reform was organized in early 2001 by the Miller Center of Public Affairs at the University of Virginia and the Century Foundation, "to formulate concrete proposals for election reform that will help ensure a more effective and fair democratic process in elections to come."[16] Honorary co-chairs were former Presidents Gerald Ford and Jimmy Carter. Several other notable lawmakers, media representatives, and jurists served on the Commission.

In August of 2001, the Commission issued a comprehensive report detailing a great array of policy recommendations concerning nearly all areas of elections in the United States. Among the many recommendations, one is of particular interest here: "News organizations should not project any presidential election results in any state so long as polls remain open elsewhere in the 48 contiguous states. If necessary, Congress and the states should consider legislation, within First Amendment limits, to protect the integrity of the electoral process."[17]

Although the Commission felt that "the principal television networks ... dealt with [the extremely close results] negligently and inaccurately ... erring assertively again and again during the course of Election Night and thereby affecting the course of the very history they were supposedly only trying to report," the report's recommendation nevertheless softened the blow by noting that "voluntary restraint is preferable to government action."[18]

The National Commission thus heeded the advice of its own legal Task Force, that "a law restricting exit polling ... would ... face high hurdles" and refrained from recommending an outright ban on exit polls or on all election forecasts prior to nationwide poll closure.[19] More tamely, the Commission urged instead that the media merely restrain themselves and that citizens refuse to participate in exit polls, a practice which it accused of being inherently and increasingly flawed.[20]

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[16] NATIONAL COMMISSION ON FEDERAL ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS (2001), at 87 [hereinafter NATIONAL COMMISSION].

[17] *Id.* at 11

[18] *Id.* at 60, 11.

Should voluntary restraint not be sufficient, however, the Commission held that it would be permissible, within existing law, to adopt statutes prohibiting government officials from providing official vote counts from quickly tallied precincts and raw, preliminary state vote tallies, both of which the media usually rely upon in their projections in addition to exit polls.[21] This would force the media to turn even more heavily to arguably unreliable exit polls. Not only would this further expose the possible flaws of such polls, but would also "shift the burden in spending from media projections right back to where it belongs—to the television industry that hopes to profit from making them."[22]

Purpose of the Study

The tragedies of September 11, 2001, brought to an end, at least for the time being, America's electoral hangover. When the nation goes to war, it no longer seems appropriate to be questioning the legitimacy of its leadership. However, although priorities may have temporarily shifted, perhaps even with proper cause, it should not be presumed that erstwhile problems have thereby found their resolution. To be sure, in a climate of war and recession, electoral reform can no longer be one of America's immediate concerns, but its long-term importance cannot and should not be overlooked. As the United States professes to fight for democracy abroad, lawmakers on the home front still need to take steps to ensure that that very system will function more smoothly in the future than what we witnessed in November 2000.

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[19] TASK FORCE ON THE CONSTITUTIONAL LAW AND FEDERAL ELECTION LAW, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS: TASK FORCE REPORTS TO ACCOMPANY THE REPORT OF THE NATIONAL COMMISSION ON ELECTION REFORM (2001), at 46.

[20] The Commission, incidentally, seemed dead to the irony of basing its own argumentation on "public opinion surveys [that] have disclosed abiding irritation with early projection of election results." NATIONAL COMMISSION, *supra* note 16, at 63.

[21] The Commission believed Congress may be able, under the Elections Clause and Article II, Section I, of the Constitution, to legislate directly on these matters if the individual states fail to act on their own. See NATIONAL COMMISSION, *supra* note 16, at 65. Unfortunately, such possible jurisdictional disputes concern mainly electoral/constitutional law and are thus well beyond the scope of this inquiry.

[22] NATIONAL COMMISSION, *supra* note 16, at 65.

Electoral reform must be multifaceted. This analysis, however, discusses only those aspects that pertain to potential new regulations. Based on the negative assumption that voluntary media restraint will not be sufficient to meet the hopes of the National Commission, the paper focuses instead on what is or may be legislatively permissible within the confines of the First Amendment.

Neither the National Commission nor its legal Task Force submitted in any detail the legal deliberations upon which, one must hope, they based their conclusions—that exit polls cannot be banned outright, but that government officials can and should withhold vote tallies. The task of this inquiry, then, is to evaluate the recommendations of the National Commission in light of a conventional interpretation of relevant law, including the limited case law that has addressed the matters more or less directly. The law in this area does not appear to have been settled definitively. The U.S. Supreme Court has not yet spoken conclusively concerning the questions at hand, and there is little reason to believe that the high court will have the occasion to do so in the foreseeable future.[23]

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[23] The Federal Communications Commission has so far refused to enter the fray. It thus declined to even initiate an investigation into a complaint filed by the Smithwick & Belendiuk law firm, alleging distortion by the four television networks concerning the outcome of the Florida vote. *See* ENFORCEMENT BUREAU OF THE FEDERAL COMMUNICATIONS COMMISSION, ORDER, EB-00-IH-0438 (2001) [hereinafter ENFORCEMENT BUREAU].

Legal Analysis of Policy Recommendations

The First Amendment

In the past the Supreme Court has struggled to determine what should be considered speech, and which degree of First Amendment protection different types of speech should be awarded. The Court has, for instance, adjusted over the years its understanding of whether expressive action could also be regarded as symbolic speech,[24] and whether commercial speech was deserving of the same degree of protection as other speech.[25] Fortunately, such matters are not at issue here. The communication of election forecasts clearly qualifies as speech—even as political speech, which traditionally has been awarded the highest degree of protection. Furthermore, although news media generally operate for profit, self-promotion is not, at least not demonstrably, the primary motive behind the forecasts. Thus, if the speech in question is regarded as political, it cannot also be subject to the occasionally more stringent regulation of commercial speech, which is typically not considered a core value of the First Amendment.

In other words, although it is unlikely that the Framers, when they first amended the new Constitution, had thought specifically about exit polls or early forecasts, there is good reason to believe that their original intent in drafting the First Amendment would apply also to media election forecasts.

The starting point for this analysis, therefore, must be that the First Amendment would provide its most extensive protection to media election forecasts, unless other considerations outweigh the cost of limiting such speech. If the rationale of First Amendment absolutism prevailed, the analysis could reach a swift conclusion. There would be no basis whatsoever for infringement on the news media's right to project election results. Historically, however, the absolutist theory has enjoyed very limited support on the Supreme Court or in the American public, "because it lacks the recognition that other important human rights often conflict with freedom of speech and press."[26] This analysis is conducted instead under the presumptive propriety of the more common preferred position balancing theory, which posits that freedom of speech may be curtailed only when the most compelling of interests are at stake.

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[24] *See* Texas v. Johnson, 491 U.S. 397 (1989); United States v. O'Brien, 391 U.S. 367 (1968).

[25] *See* Central Hudson v. Public Service Commission, 447 U.S. 557 (1980).

Privacy and Libel, Seditious and Otherwise

Several of the most important and heavily litigated areas of mass media law are easily dismissed as largely irrelevant to the concerns raised here, most notably privacy and libel law. The main reasons why this dismissal nevertheless merits explication include the customary prominence of these areas of media law and the frequency with which they are used to challenge actions of the media.

Privacy law is not by its nature related to the same set of First Amendment concerns as are election forecasts. However, if media forecasts were found routinely to violate privacy law, this fact might be relevant in a balanced consideration of whether this speech was worthy of the fullest protection of the First Amendment. Therefore, it is imperative that intrusion, the only prong of privacy law with arguable relevance to this inquiry, be speedily rejected as grounds for a successful suit against media organizations or their pollsters. Clearly, no "reasonable expectation of privacy" exists at the polling station.[27] While the actual casting of the ballot is secret by law, elections as a whole are probably, and should be, the most public phenomenon in truly democratic societies and cannot be declared off-limits for the media.

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[26] DON R. PEMBER, MASS MEDIA LAW 44 (1999).

[27] Katz v. United States, 389 U.S. 347, 360 (1967).

As it might relate to election forecasts, the field of libel law, similarly, is less pertinent to core First Amendment concerns, but a pattern of abuse might nevertheless be held against the media. It should be remembered also that libel challenges are the most common problem faced by persons working in the mass media.[28] However, the test for libelous conduct that became clarified with *New York Times v. Sullivan*[29] allows for easy dismissal:

While election forecasts are clearly published facts identifying individuals, the remaining elements of the well-known test are more questionable. Conceivably, a severely biased exit poll could be construed as having defamatory elements, but the mere measurement of public opinion clearly does not lend itself to defamation. Also, although the academic verdict, as mentioned, has been unclear as regards the scientific value and possible effects of election forecasts, falsity would become relevant only if the data were fraudulent, or the poll results were knowingly reported incorrectly.[30] Evidence, however, could be prohibitively hard to come by.

Finally, because office seekers are unquestionably public officials, the standard of actual malice would apply in the determination of fault. This burden of proof would fall heavily on the displeased plaintiff, and again it would seem all but impossible to support the allegation with convincing evidence that the media or their polling organizations acted with knowledge of falsity or reckless disregard for the truth rather than mere negligence. Only in the most extreme circumstances could election forecasting be libelous.[31]

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[28] *See* PEMBER, *supra* note 26, at 127.

[29] 376 U.S. 254 (1964).

[30] The general illegality of such reporting was firmly established in *Goldwater v. Ginzburg*, 414 F. 2d 324 (1969).

[31] Nevertheless, the complaint filed with the FCC urged the agency to examine whether the network projections amounted to "intentional distortion" and whether it constituted "reckless disregard" for the accuracy of the data. ENFORCEMENT BUREAU, *supra* note 23. The plaintiff further asked the Commission to determine whether the networks "knowingly or recklessly made inaccurate statements as to the outcome of the Florida vote to generate ratings or to manipulate or influence voting and the outcome of the Presidential election." *Id.* The plaintiffs, in other words, suspected libelous conduct on the part of the networks. The FCC, however, rejected the complaint on its face as lacking "sufficient basis," thus illustrating the futility in seeking to reform the news media via libel law. Supposedly, several other lawsuits were filed on behalf of Republicans who claimed the projections for Gore

As for libel of the seditious kind, the First Amendment relevance is more explicit, but the practical relevance vanishes completely. While election forecasts may conceivably be packaged, with another stretch of the imagination, so as to constitute "advocacy of the use of force or of law violation," it is not within the realm of reason to foresee such advocacy as "directed to inciting or producing imminent lawless action and ... likely to incite or produce such actions."[32] The fact that the undeniable electoral and to some extent political and judicial crisis of 2000 did not produce a notable state of social crisis can only be taken as a solid indication that elections do not, at least in the current social climate, have the power to stir the kind of passion or threats necessary to invoke the doctrine of seditious libel.

Prior Restraint

If ever the First Amendment had a relatively undisputed meaning, it would be its intention to bar the government from exercising prior restraint. This agreement on the impropriety of prior restraint should not, of course, be taken to suggest that prepublication censorship has never been exercised during the history of the Republic. One may argue with good reason that any kind of limitation on speech preceding its communication will necessarily constitute some form of prior restraint. However, because the following sections of this analysis address several specific types of limitations, prior restraint is here to be understood only in the more general sense laid down by Chief Justice Charles Evans Hughes in the defining case, *Near v. Minnesota.*[33] Briefly summarizing the conditions under which prior restraint may be permissible, it seems almost

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discouraged them from voting. See Phillip Taylor, *Law Firm Asks FCC to Investigate Early Election Calls*, (Dec. 1, 2000) < http://www.freedomforum.org/templates/document.asp?documentID=3204 >. This author, however has been unable to ascertain the outcome or status of these suits. It is unknown to the author whether other such cases are pending either in the courts, with the FCC, or with other governmental bodies.

[32] Brandenburg v. Ohio, 395. U.S. 444 (1969).

[33] Near v. Minnesota, 283 U.S. 697 (1931).

redundant to note that election forecasts do not appear to satisfy the unusually heavy burden of any of the Supreme Court's four conditions: wartime location of troops (i.e., national security), obscenity, overthrow of government, or fighting words (i.e., incitement of violence). Although it must be noted that these conditions constitute a rather vague legal standard,[34] prepublication censorship remains the exception, not the rule. In others words, unless potential new regulations can be based on other areas of media law, the Court's general limitation on prior restraint would seem to prohibit any infringement.

Different Media, Different Regulations?

Somewhat related to the notion of prior restraint is the ease or difficulty with which the government can regulate the various types of media. Is it permissible within the limits posed by the First Amendment to control the speech of certain media more so than that of others?

Historically, the answer to that question has been a qualified "yes." The Supreme Court has long regarded the usage of public airwaves as a privilege, not a right, giving the government (i.e., the FCC) greater leeway in regulating broadcast media than other media.[35] In later rulings,[36] the Court has cited "spectrum scarcity" in its permission of "more intrusive regulation of broadcast speakers than of speakers in other media,"[37] and has found that broadcasters are "burdened by enforceable public obligations."[38]

This prong of media law, in other words, would not in and of itself seem to preclude a (narrowly tailored) ban on broadcast media election projections, if they were to be found to be antithetical to the public interest. However, the strong trend toward media deregulation in recent decades would seem to militate against such increased regulation, as would the fact that the FCC has been particularly loath to regulate news and public affairs programming, stating that "journalistic or editorial discretion in the presentation of news and public information is the core concept of the First Amendment free press guarantee."[39]

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[34] *Cf.* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY (1992).

[35] *See* National Broadcasting Company, Inc. v. U.S., 319 U.S. 190 (1943).

[36] *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Red Lion Broadcasting Co. v. FCC, 395 U.S 367 (1969).

[37] Turner Broadcasting System v. Federal Communications Commission, 512 U.S. 622, 637 (1994).

[38] CBS Inc. v. FCC, 453 U.S. 367, 395 (1981).

In any case, to restrict broadcast radio and television, but not cable television and the Internet, would seem to go only a small way toward achieving a goal of banning election forecasts. This is particularly true in this era of "media convergence,"[40] in which the different types of media are becoming increasingly indistinguishable through technological developments and cross-ownership.

The Supreme Court has established that government has a *limited* right to regulate cable television,[41] but also that cable TV enjoys a fuller First Amendment protection than that awarded broadcast television.[42] One implication of this state of affairs is that a statute of restricted speech of media other than broadcasters, if challenged, would be subject to "strict scrutiny" by the courts, meaning it could be upheld only if the government proves that it is necessary "to promote a compelling interest" and is "the least restrictive means to further the articulated interest."[43]

Does a valid argument exist, then, that the state has such a "compelling interest" in barring media election forecasts? Certainly, the state has a justifiable interest in preventing the media from interfering with the electoral process in a way that might alter its outcome. However, based on common sense as well as the research and case law cited in this analysis, it seems problematic to argue with any certainty that media projections have that effect. Rather, it seems reasonable to presume that the vast majority of voters understand that a forecast is not the same as a final result, and that they can still affect that outcome by casting their ballots. Moreover, if a voter decides, especially after being exposed to a media projection, that the act of voting would be a wasted effort, it could certainly be argued with some force that that voter has made a free and informed choice. One would be wise to bear in mind the words of the Supreme Court, though its guidance was delivered in a different context, that "the First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[44] Furthermore, even if a court were to acknowledge the state's compelling interest in gagging the media on election night, the government would still have to demonstrate that that interest could not be furthered by less restrictive means.

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[39] FEDERAL COMMUNICATIONS COMMISSION, LETTER, 1800E3-JLB (1998), at 5.

[40] *See* DAVID TARAS, POWER AND BETRAYAL IN CANADIAN MEDIA (1999).

[41] *See* FCC v. Midwest Video Corp., 440 U.S. 689 (1979); U.S. v. Southwestern Cable Co., 392 U.S. 157 (1968).

[42] *See* Los Angeles v. Preferred Communications, 476 U.S. 488 (1986).

[43] Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 126 (1989).

Finally, the matter of license renewal would also apply only to broadcast media. Congress has directed the Federal Communications Commission to renew a broadcaster's license as long as the station has served the public interest, has not seriously violated any codes, and has not shown a pattern of abuse of relevant regulations.[45] In other words, it would not in principle be outside the scope of the FCC to refuse license renewals to broadcasters found in violation of these guidelines, particularly if it has failed to serve the public interest.[46] Again, however, the FCC's recent preference for deregulation, its near-automation of the renewal process, and its appropriate reluctance to consider the content of programming should not inspire hope among those who might wish for a gradual obstruction to election forecasts through this avenue. A defense could be easily mounted that election forecasts at least attempt to do just the opposite of what their detractors have asserted, namely to serve the public interest on Election Night through the best means available. Furthermore, effective regulation would most likely fall outside the jurisdiction of the FCC. The Commission licenses local television stations, whereas most election polling is conducted by either national polling organizations, the national networks, or by VNS, the networks' joint effort.

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[44] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996).

[45] *See* PEMBER, *supra* note 26, at 584.

[46] Sen. Ted Stevens, R-Alaska, in fact, suggested at a Republican strategy meeting following Election 2000 that broadcast license renewals be conditioned on, among other things, the broadcaster's abstention from exit polling—acknowledging, however, that "it's a very touchy thing." Associated Press, *Senator Considers Resurrecting*

Time, Place, and Manner

Two seminal rulings provide the existing legal underpinnings of exit polling: *Daily Herald v. Munro* and *Burson v. Freeman*.[47] Unfortunately, the two rulings appear to be somewhat at odds. The law concerning exit polling, in other words, is not fully settled. The arguments have mostly concerned issues relating to time, place, and manner restrictions.

Fervent opponents of exit polls would probably prefer an outright ban on the practice. However, the conventional criteria of evaluation applied to time, place, and manner restrictions on free speech reveal that such a prohibition would be quickly struck down on First Amendment grounds. A direct ban on just exit polling at voting stations certainly would not be content neutral in its restriction of communication. It would also impermissibly constitute a complete ban on that type of communication which only exit polling can provide. Courts seem to have accepted the argument that there is no other way to obtain the type of information gathered in exit polls.[48] In contrast, a statute banning all types of solicitation at polling stations might meet the standard of

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Legislation to Regulate Election Reporting (Nov. 27, 2000)
< http://www.freedomforum.org/templates/document.asp?documentID=3477 >.

[47] Burson v. Freeman, 504 U.S. 191 (1992); Daily Herald v. Munro, 838 F.2d 380 (9th Cir. 1988).

[48] In its decision in *CBS Inc. v. Smith*, the court thus leaned on the testimony of Everett Carl Ladd, Executive Director of the Roper Center for Public Opinion, who stated that "there exists no other polling technique that provides as reliable a source of information on voters and voting behavior." 681 F. Supp. 794, 800 (S.D.Fla. 1988).

content neutrality, but would surely be struck down on the grounds that it completely banned several types of communication. In any case, of course, neither type of statute would be narrowly tailored. The fact that a substantial state interest might be present, then, would not be sufficient to justify either type of ban.

Attempts to curb exit polling, therefore, have steered clear of such obvious violations of the First Amendment. Legislation was passed instead in a number of states that banned exit polling *within a prescribed distance* from polling stations—arguably analogous to the rationale behind restricted access to abortion clinic entrances and patrons.[49] The purpose of such legislation, of course, would be to make exit polling more cumbersome and possibly no longer worth the cost and effort. While this line of thinking was not supported in the official recommendations of the National Commission, a group of partial dissenters led by Colleen C. McAndrews noted that this type of "carefully crafted direct ban might withstand constitutional challenge."[50]

In 1988, rulings were handed down in a series of cases that all concerned such restrictive statutes.[51] The challenged regulations differed in detail, but were generally comparable. The rulings, similarly, all followed that issued by the Ninth Circuit in *Daily Herald v. Munro*,[52] in which the court struck down a Washington statute that prohibited exit polling within 300 feet of a polling place.

In its ruling, the court granted that "states have an interest in maintaining peace, order, and decorum at the polls and in 'preserving the integrity of their electoral processes.'"[53] However, the court found that the statute was not narrowly tailored to further that interest, because it prohibited nondisruptive as well as disruptive exit polling. "Moreover," wrote the court, "the statute is not the least restrictive means of advancing the state's interest. The statute is unnecessarily restrictive because [another statute] already prohibits disruptive conduct at the polls," and "several other less restrictive means of advancing this interest exist: for example, reducing the size of the restricted area; requiring the media to explain that the exit poll is completely voluntary; requiring polling places to have separate entrances and exits, … or prohibiting everyone except election officials and voters from entering the polling room."[54]

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[49] *See* Hill v. Colorado, 530 U.S. 703 (2000); Madsen v. Women's Health Center, 512 U.S. 753 (1994); Schenk v. Pro-Choice Network, 519 U.S. 357 (1997).

[50] NATIONAL COMMISSION, *supra* note 16, at 82.

[51] *See* CBS Inc. v. Smith, 681 F. Supp. 794 (S.D.Fla. 1988); National Broadcasting Company, Inc. v. Cleland, 697 F. Supp. 1204 (N.D.Ga. 1988); National Broadcasting Company, Inc. v. Colburg, 699 F. Supp. 241 (Mont. 1988).

[52] 838 F.2d 380 (9th Cir. 1988).

The circuit court ruling in *Munro*, however, may no longer stand after the Supreme Court's ruling in *Burson v. Freeman*,[55] in which the Court's conservative majority upheld a Tennessee statute that prohibited the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place. In other words, neither the statute nor the ruling targeted exit polling explicitly. McAndrews' dissenting group on the National Commission invoked *Burson* in bringing attention to the possibility of a direct ban.

The Court in *Burson* recognized that the statute in question restricted political speech, to which the First Amendment "has the fullest and most urgent application." Moreover, since democracies by definition consider elections to be part of the public domain, the challenged statute prohibited "speech in quintessential public forums," in which assembly and debate traditionally enjoy the utmost constitutional protection.[56] Finally, the Court found the restriction

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[53] *Id.* at 385.

[54] *Id.* at 385. Incidentally, in *National Broadcasting Co., Inc. v. Cleland*, a Georgia district court did just that, finding a 250-foot restricted zone unconstitutional, and instead issued an injunction that the statute in question could only be legally enforced within 25 feet of the exit of any polling place. *See* 697 F. Supp. 1204 (N.D.Ga. 1988).

[55] 504 U.S. 191 (1992).

[56] *Id.* at 196. It is unclear whether the voting station itself is by definition considered a "quintessential public forum." However, a restricted zone of, say, 200 or 500 feet may extend into indisputably public spaces such as sidewalks, streets, parks, etc. The government is not, of course, barred absolutely from restricting speech in public spaces, but the time, place, and manner requirements are far stricter in such fora.

to be content-based, as it restricted political but not commercial solicitation, and thus did not meet the required standard of "a facially content-neutral time, place, or manner restriction."[57]

The Court therefore, as it must, subjected the Tennessee statute to strict scrutiny, requiring a demonstration of compelling state interest and of the likelihood that the statute would serve this asserted interest. Although strict scrutiny of statutes usually leads to their invalidation, the Court found in these circumstances that "a State has a compelling interest in protecting voters from confusion and undue influence," and "in preserving the integrity of its election process."[58] Specifically, a state may legitimately seek to prevent "two evils: voter intimidation and election fraud."[59] As for the particular statute, the Court found that a 100-foot restricted zone "is on the constitutional side of the line,"[60] but refrained from establishing a fixed boundary within which a state may assert its compelling interest in preventing intimidation and fraud.

As for the rationale in *Munro*, that the statute was redundant because another statute already prohibited disruptive conduct at polling stations, the Court in *Burson* reasoned that "intimidation and interference laws fall short of serving a State's compelling interests because they 'deal only with the most blatant and specific attempts' to impede elections."[61] The Court did not even in this case require the State to submit "factual findings to determine the necessity of [its] restrictions on speech," as Justice Stevens lamented in a scorching dissent.[62] Rather, the Court's plurality found that "the link between ballot secrecy and some restricted zone surrounding the voting area … is common sense."[63]

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[57] *Id.* at 197.

[58] *Id.* at 199.

[59] *Id.* at 206.

[60] *Id.* at 211.

[61] *Id.* at 206.

[62] *Id.* at 222 (Stevens, J., dissenting).

[63] *Id.* at 207.

It was further argued in *Munro*, however, that the Washington statute was unconstitutional for another reason: "that the stated purpose for the statute of protecting order at the polls was a pretext, and that the state's true motive was to prevent the media from broadcasting election results before the polls closed."[64] Such a purpose, the court agreed, would indeed constitute impermissible speech regulation. In this case, however, it could not be proven that this was the state's true motive. Nevertheless, the court also noted that even if this were a permissible purpose, "the statute is not narrowly tailored to protect voters from the broadcasting of early returns. Election-day broadcasting is only one use to which the media plaintiffs put the information gathered from exit polling...."[65] Such information is also used for, among other things, post-election media and academic analyses, and a ban on exit polling would impermissibly prohibit the speech resulting from such analyses as well.

The jurisprudence imparted by the rulings in *Munro* and *Burson* appears to suggest that legislators could prohibit solicitation and campaigning within a reasonable distance of polling stations, but a ban on exit polling for the purpose of preventing the communication of election forecasts would not withstand First Amendment scrutiny. Any restrictions must be justified as necessary to advance the government's broad compelling interest in preventing interference with voters. The *Burson* ruling was also important, however, in noting that a state *need* not include such activities as exit polling and charitable or commercial solicitation in its restriction of more blatant or intrusive voter solicitation.

As mentioned, the Supreme Court in *Burson* did not require that evidence be submitted to justify which types of speech could be considered sufficiently disruptive for a restriction to apply. The lower-court evidence submitted in the 1980s cases certainly does not appear to have settled whether exit polling should warrant restriction on such grounds. In *National Broadcasting Co., Inc. v. Cleland*, for instance, anecdotal evidence was summarized to the effect that voters had "perceived exit polling as a form of campaigning,"[66] while in *CBS Inc. v. Smith*, one of the plaintiffs had to concede that "he had no actual experience with exit pollsters causing any problems."[67] The court eventually held that "there has been no showing that exit polls or other voter interviews by journalists in any way have disrupted any polling place."[68]

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[64] Daily Herald v. Munro, 838 F.2d 380, 386 (9th Cir. 1988).

[65] *Id.* at 387.

Given the dearth of compelling evidence demonstrating that polling activities do, in fact, substantially disrupt elections, it seems rather problematic to apply the more contentious abortion clinics experience to America's ordinarily peaceful polling stations—particularly in light of the fact that the restricted zones outlined in abortion clinic statutes have tended to be much narrower than is the case for most no-polling zones. For example, the Supreme Court in 1994 upheld the constitutionality of a Florida statute that created a modest 36-foot buffer outside the entrance to a reproductive health clinic, in which zone no agitation is permitted.[69] To further distinguish abortion clinics from polling stations, it should also be considered that it would be difficult to argue beyond specific instances that one party or candidate's voters would be more likely to be intimidated or harassed than would those of another party or candidate.

Accordingly, a post-*Burson* ruling by the Fifth Circuit, *Schirmer v. Edwards*,[70] reflected the seemingly more prudent portion of the *Burson* rationale and thus found greater justification for restricting political campaigning than for curbing exit polling: "While there is no evidence of widespread voter harassment or intimidation by exit-pollers, there is evidence that poll workers do create these problems."[71] The court, therefore, found that the rulings culminating in *Munro* did not apply and instead used the opening left by *Burson* to distinguish exit polling from other types of soliciting.

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[66] 697 F. Supp. 1204, 1208 (N.D.Ga. 1988).

[67] 681 F. Supp. 794, 801 (S.D.Fla. 1988).

[68] *Id.* at 803.

[69] Madsen v. Women's Health Center, 512 U.S. 753 (1994).

[70] Schirmer v. Edwards, 2 F.3d 117 (5th Cir. 1993).

The Supreme Court, however, denied certiorari in *Schirmer* in 1994. The highest court of the land has thus not yet welcomed the opportunity to address specifically the conditions constituting that "compelling state interest" under which exit polling may be proscribed, nor has the Court embraced the unenviable task of establishing the specific zones in which restrictions may be acceptable. While it is clear that no blanket prohibition of exit polling would pass a First Amendment test, permissible degrees of disruption vs. restriction have yet to be clarified.

It bears reiteration that the National Commission on Election Reform did not, in the official part of its report, urge Congress to curb election forecasts by way of time, place, and manner restrictions. To the extent that Congress will heed the recommendations of the Commission, it is therefore unlikely that it will institute such a ban in the near future. Having already denied certiorari in *Schirmer*, it therefore appears equally unlikely that the Supreme Court will soon have the occasion to rule on the constitutionality of such measures.

Right of Newsgathering

Courts have entertained little doubt that the media have at least a qualified right to gather news through voluntary, nondisruptive exit polling.[72] If Congress, then, cannot eliminate exit polling entirely by way of time, place, and manner restrictions, nor issue a direct ban on media projections generally, could it instead prohibit government officials from releasing ballot counts to the media? In other words, could lawmakers deny the media access to preliminary ballot counts until the polls have closed in a district, or even prohibit the release until polls have closed nationwide? The National Commission clearly thought so: Even if it would not be permissible to prohibit early projections outright, "...the First Amendment does allow government to control what its own officials do."[73] Preliminary vote tallies could be ordered withheld by either the federal government or the individual states.

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[71] *Id.* at 122. To avoid confusion, it should be mentioned that "poll workers" have nothing to do with opinion polling. The term refers to individuals hired by politicians for last-minute campaigning at polling stations. The Louisiana law (a 600-foot restricted zone), which was held constitutional, applied only to such poll workers.

[72] In *CBS Inc. v. Smith*, the Florida court held that the statute in question "impermissibly restricts Plaintiffs [the networks] from gathering and reporting basic information about the political process to the general public on election day." 681 F. Supp. 794, 796 (S.D.Fla. 1988). *See also* National Broadcasting Company, Inc. v. Cleland, 697 F. Supp. 1204, 1214 (N.D.Ga. 1988).

The First Amendment, the Supreme Court has written, "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[74] Still, although "news gathering is not without its First Amendment protections,"[75] these protections are not considered absolute. In an otherwise unrelated matter, the Court has held, for instance, that freedom of the press does not prevent prison officials from prohibiting face-to-face interviews with inmates.[76] In *Houchins v. KQED*, the high court similarly stated, "neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."[77]

In its ruling in *Pell*, the Court did not require the government to unequivocally establish a compelling interest to warrant the restriction, as the government ordinarily must when censoring speech. The Court instead balanced First Amendment rights against governmental interests such as "the internal security within the corrections facilities."[78] Although the First Amendment prevents the "government from interfering in any way with a free press," it does not "require government to accord the press special access to information not shared by members of the public generally."[79]

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[73] NATIONAL COMMISSION, *supra* note 16, at 65.

[74] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980).

[75] Branzburg v. Hayes, 408 U.S. 665, 707 (1972).

[76] *See* Pell v. Procunier, 417 U.S. 817 (1974).

[77] Houchins v. KQED, 438 U.S. 1, 15 (1978).

[78] Pell v. Procunier, 417 U.S. 817, 823 (1974).

Since its seemingly vague ruling in *Richmond Newspapers*, the Supreme Court has done little to clarify its position on the right of newsgathering. If the U.S. Congress were to pass legislation to prohibit or delay the release of vote tallies, the Supreme Court might, if nothing else, be given a welcome opportunity to once and for all establish the law of the land. By balancing the interests of the state against the interests of the media and their audiences, the Court could, one might hope, arrive at a "user-friendly" set of more general criteria to be applied as a test in future cases involving the right of newsgathering.

In testing specifically the right of access to vote counts, the courts would have to address the potential benefits in denying media access to vote counts. It might no longer be possible to avoid the begging question whether media election forecasts do, in fact, confuse or discourage voters, or whether voters merely factor such information into making an informed choice. Still, one must hope the courts will not have to also determine whether media projections by definition are speech worthy of protection.[80] The court would also, of course, need to consider the ill effects of withholding ballot counts, perhaps evaluated against the effects of potentially less intrusive means. For instance, if access were completely denied, might the media instead rely more extensively on exit polling, which could result in even less accurate forecasts?

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[79] *Id.* at 833.

[80] Lower courts have grappled in cases unrelated to the specific matters of this analysis to determine whether evidence supplied by exit polls meets the standard usually required by courts. In *Romero v. City of Pomona*, a California district court thus found "that the exit poll survey is a reliable method for determining whether political cohesiveness exists." 665 F. Supp. 853, 858 (C.D.Cal. 1987). In contrast, in *Aldasoro v. Kennerson*, "all experts for both sides agreed that these statistical methodologies were not precise." 922 F. Supp. 339, 344 (S.D.Cal. 1995).

John Seigenthaler, the founder of the First Amendment Center at Vanderbilt University, served on the National Commission and issued a forceful three-pronged dissent to its official report. Part of it must be quoted at some length:

> First, local election officials certainly have a First Amendment right to engage in political speech—and discussing election results clearly is political speech. I cannot believe that the Congress should or would seek to make a law that gags local officials from giving citizens and the news media—in their communities or in their state—presidential or Congressional election returns the moment they are available. Second, such a law, if enacted, surely would result in news media lawsuits challenging government action to directly and blatantly interfere with the First Amendment right of journalists to gather and report the news when it is news .... Finally, ... it is impractical and unrealistic .... Elected and appointed local election officials feel a duty to get returns to the public—their constituents who elect them and pay their salaries—at the earliest possible moment on election night.[81]

Seigenthaler's protest proves that even if First Amendment absolutism has struggled to find a home on the Supreme Court, it is still alive and well elsewhere. His dissension, however, seems to hinge on a somewhat wishful interpretation of the high court's somewhat elusive ruling in *Richmond Newspapers*. Although that ruling did seem to indicate a growing recognition of a First Amendment right of newsgathering, it is disingenuous to suggest that the principle has been firmly settled.

Conclusion

In the case of election forecasts, the Supreme Court has thus far prudently adhered to its established principle of not evaluating the "quality" of the speech in question. As noted above, public debate has been split between detractors and proponents, and the same appears to be the case in academic research.[82] In any case, whether election forecasts are worthy of public participation and attention are judgments better made by voters and media consumers. The fact that forecasts and exit polling persist to such great extent would appear to suggest, at least, that media outlets believe their audiences are willing to endure the hassles of being polled and subjected to incomplete results, so that they may also reap the benefits of information.

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[81] NATIONAL COMMISSION, *supra* note 16, at 83.

Overall, the National Commission on Election Reform spoke with caution. Its obvious and intense aversion toward media election forecasts did not lead it to suggest a complete prohibition of exit polling. As this analysis has demonstrated, such a ban could not withstand strict First Amendment scrutiny. However, the Commission did not officially entertain the notion that it might be permissible to hinder exit polling by way of time, place, and manner restrictions. While this author believes that exit polling, most of which is conducted responsibly, could never rise to a level of disturbance necessary to warrant such restrictions, it must be reemphasized that the courts have not yet shut that door completely. If any value is to be placed in the First Amendment, one can only hope that the Supreme Court will shut it resoundingly if given the opportunity.

On the other hand, existing jurisprudence does not seem to preempt a legislative course of action aimed at preventing election officials from releasing vote tallies to members of the media or the public at large. Functioning as an official of the state could certainly be conditioned on the agreement that such information be withheld. While the Supreme Court's ruling in *Richmond Newspapers* did seem to suggest an emerging acceptance of a right of newsgathering, the principle is by no means established law. In the issue at hand, it would not seem patently unreasonable to balance the interest of a fair election against the wishes of the media. Nevertheless, one might hope that a future "'Networks' v. FCC" encounter could spur the high court to once and for all establish a clearer set of criteria for newsgathering and thus complete what it hinted in *Branzburg* and asserted with greater force in *Richmond Newspapers*.

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[82] *See also* Warren J. Mitofsky & Murray Edelman, *A Review of the 1992 VRS Exit Polls*, *in* PRESIDENTIAL POLLS AND THE NEWS MEDIA 83 (Paul J. Lavrakas & Michael W. Traugott, eds., 1995); Michael W. Traugott & Vincent Price, *A Review: Exit Polls in the 1989 Virginia Gubernatorial Race: Where Did They Go Wrong?*, 56 PUB. OPINION Q. 245 (1992).

The National Commission's humble encouragement of voluntary media restraint seems sufficiently uncontroversial to garner support from most moderate observers. In the early days of reflection and introspection following Election 2000, the media certainly appeared to have learned their lesson. On the other hand, four years can be a long time in the spheres of news and politics. Whatever steps are taken, the nation must continue to be mindful of the obvious yet at times surprisingly forgettable notion that its most cherished principles prove their true worth only when they are truly challenged. The current impetuous attempts to curb civil liberties bestow an even greater urgency on that crucial lesson. In that vein, the final words belong to Sen. Patrick Leahy, who admonished a sometimes careless and forgetful American public that, "everybody is in favor of the First Amendment. But we'd have a hell of a time ratifying it today."[83]

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[83] Philip Shenon, *Public Lives: Cybersenator Defends the Net, Despite Some Sour Notes*. N.Y. TIMES, July 17, 2000, at A12.

Theory Rejected: The Framing of the Freedom of Expression Section of the South African Constitution

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Classic libertarian orthodoxy situates the system of freedom of expression[1] at the center of a democratic society's ability to resolve civil conflict. "Freedom of expression is a method," Thomas I. Emerson has explained, "of maintaining the precarious balance between healthy cleavage and necessary consensus."[2] Even the most liberal democratic theorists concede, however, that unlimited constitutional protection of freedom of expression can jeopardize social stability. Once this stipulation is made, the key issues for a democracy become how constitutionally to provide for the kind and amount of freedom of expression that are required to achieve Emerson's "precarious balance."

The seemingly endless debates over issues in freedom of expression have engaged the minds of the world's finest political philosophers. Their conclusions have influenced the provision for freedom of expression in the national constitution, the ultimate statement that a society makes on freedom of expression. Understanding these philosophies is important to understanding the constitutional law on freedom of expression.

Another important level of analysis of this constitutional law, however, is directed at a realistic understanding of the ideological context within which the law is made. Perhaps to state the obvious, constitutional conventions are organized by politicians with political agendas, and constitutions are products, like legislation, of the political process of compromise. Cutting to the heart of the matter, Vernon Bogdanor asserts: "Constitutional change is intimately linked with the rise and fall of political parties."[3] In South Africa, the recent case in point, the "constitution is best understood," as Siri Gloppen observed, "from the perspective of the rivaling constitutional positions that stood against each other throughout the process and kneaded the constitution into its present shape."[4]

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[1] The term "system of freedom of expression," which will be used throughout this paper, is borrowed from Thomas I. Emerson's classic work by that name on the system in the United States. He calls a system an "interrelated set of rights, principles, practices, and institutions" of freedom of expression that "has overall unity of purpose and operation" and accommodates other features of national life. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 2 (1972). The term "theory" or "theories" of freedom of expression will be used almost interchangeably with "system." A theory may be of or part of a system of freedom of expression.

[2] *Id.* at 7. This is one of Emerson's four "values and functions" of freedom of expression. The others are "assuring self-fulfillment," "advancing knowledge and truth" and fostering "participation in decision masking by all members of society." *Id.* at 6-7.

[3] Vernon Bogdanor, *Introduction, in* BOGDANOR, CONSTITUTIONS IN DEMOCRATIC POLITICS 5 (1988).

Even when framed in philosophy that purports to produce neutral principles of freedom of expression, original constitutional policy remains the product of compromise between ideologists.[5] Then, in order to understand the assumptions of a system's theory of freedom of expression, one should understand the ideologies and how they were compromised to produce the language in the constitution.[6]

This paper is devoted to an examination of the debates over the content of the freedom of expression section of South Africa's Constitution. This paper will compare the arguments advanced by the political parties at the 1993-96 Constitutional Convention with Section 16—the section on freedom of expression in the final constitution, which took full effect in 1999.

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[4] SIRI GLOPPEN, SOUTH AFRICA: THE BATTLE OVER THE CONSTITUTION 4 (1997).

[5] *See, e.g.*, ERIC BARENDT, FREEDOM OF SPEECH (1985); STANLEY FISH, THE TROUBLE WITH PRINCIPLE (1999); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985).

[6] This paper takes no position on the debates over originalism, textualism and similar approaches to constitutional interpretation. Like the U.S. Constitution, the South African Constitution makes no explicit provision that when making constitutional policy, judicial bodies should attend to the intent of the constitutional framers. Like the U.S. Supreme Court, however, the South African Constitutional Court may find such discussions useful, if not dispositive, in its deliberation on certain issues. *See, e.g*, LESLIE FRIEDMAN GOLDSTEIN, IN DEFENSE OF TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY (1991); LEONARD W. LEVY, SEASONED JUDGMENTS: THE AMERICAN CONSTITUTION, RIGHTS AND HISTORY (1995); EARL M. MALTZ, RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW (1994); DAVID A.K. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1989). In the South African context, see AZHAR CACHALIA ET AL., FUNDAMENTAL RIGHTS IN THE NEW CONSTITUTION 121-23 (1994); DENNIS DAVIS ET AL, FUNDAMENTAL RIGHTS IN THE CONSTITUTION 8-11 (1997); DAWID VAN WYK ET AL., RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER 3-4, 11-13 (1994). This paper also takes no position on the debate over whether constitutions "matter." They may matter, in both profound and specific ways, but overall they probably matter less than so many other social attributes of the respective nations that created the constitutions. On this question, Andrews wrote: "Not only are Constitutions often incomplete, they are often quite misleading." WILLIAM G. ANDREWS, CONSTITUTIONS AND CONSTITUTIONALISM 22 (1968) Finer wrote: "Almost every state in the world today possesses a written constitution. Yet, the vast majority of these are either suspended, or brazenly dishonoured or--if neither of these--are constantly and continually torn up to make room for news ones." S.E. FINER, FIVE CONSTITUTIONS 15 (1979). Maddex wrote: "Unfortunately, too many constitutions today are extremely ineffectual documents or outright shams that try to mask unbridled dictatorships." ROBERT L. MADDEX, CONSTITUTIONS OF THE WORLD ix (1995). On the U.S. First Amendment, Levy wrote: It was "boldly stated if narrowly understood [by the framers]. The bold statement, not the narrow understanding, was written into fundamental law." LEVY, *supra* note 5, at 43.

The paper concludes that Section 16 bears little resemblance to the freedom of expression policy of any of the seven political parties that participated in the convention, even though almost every party had a distinctive approach to designing a system of freedom of expression. Section 16 was the product of the political necessity of compromise between the ideological forces at work in the convention, not the product of a clear, singular vision for a progressive and modern democracy. The language of the final section reflects little of South Africa's special experience with freedom of expression under apartheid.

This paper is a case study in how a system of freedom of expression is instigated. South Africa's experience is an example of both how the infrastructure for civil discourse comes to be and of how a civil conflict is resolved. This analysis generates lessons about emerging democracy in Africa but has application in any constitutional democracy.

Background

Many factors have and will continue to influence the system of freedom of expression that evolves in South Africa. Formally, the South African Constitutional Court, with the power of judicial review, has and will play an important role through the Court's judicature. In drafting the Constitution, the Constitutional Assembly consulted international conventions and foreign constitutions. Informally, and probably even more decisive as an influence, however, is the dramatic political and social experience of South Africa.

Dutch and English colonists established trading stations at the Cape of Good Hope in the mid-17th century, beginning 150 years of expansion of European influence in southern Africa. By 1806, the British wrestled control of the Cape Colony from the Dutch, resulting in the migration to eastern territory by the Afrikaners, white separatists who developed a distinct culture and language in the region and who established states recognized by the British by 1854. The discovery of diamonds and gold in Afrikaner regions generated tensions contributing to the "Boer War" of 1899-1902. The victorious British approved parliamentary governments for the Afrikaner states and permitted enactment of segregation laws. The National Party, led by proponents of apartheid, rose to national power after World War II, establishing a stubborn political system based on white supremacy. Over the next 40 years, passive resistance led to violent resistance as security forces brutally crushed opposition leaders and organizations. Determined internal opposition, economic stress, international isolation and other pressures eventually forced National Party leaders to relent. In 1990-91 they released from prison Nelson Mandela and other leaders of the major opposition organizations, repealed segregation laws, ended a five-year state of emergency and began negotiations over a new constitutional order.[7] The "culture of censorship" throughout the period of apartheid and the struggle against it are also subjects of an involved and fascinating history.[8]

A crucial chapter in the modern history of freedom of expression is the deliberations over the freedom of expression section of the South African Constitution. Competing prescriptions for the country's system of freedom of expression were presented, attacked and defended during the Constitutional Assembly's proceedings, and compromises were reached.

For the purposes of this paper, the debate in South Africa over genuine constitutional freedom of expression begins with the framing of the freedom of expression section of the provisional constitution of 1993.[9] This section stated, in relevant part: "Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research." The ensuing deliberations concerned proposals to change the language of this section to coincide with the goals of the various political parties. This constitutional debate ends with ratification of the permanent constitution, including Section 16:

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[7] Many sources tell this story. *See, e.g.*, MARINA OTTAWAY, SOUTH AFRICA: THE STRUGGLE FOR NEW ORDER (1993).

[8] CHRISTOPHER MERRITT, A CULTURE OF CENSORSHIP: SECRECY AND INTELLECTUAL REPRESSION IN SOUTH AFRICA (1994). *See also* AFRICA'S MEDIA IMAGE (Beverly G. Hawk ed., 1992); THE ALTERNATIVE PRESS IN SOUTH AFRICA (Keyan G. Tomaselli & P. Eric Louw eds., 1991); LEE EDWARDS, MEDIAPOLITIK: HOW THE MASS MEDIA HAVE TRANSFORMED WORLD POLITICS 253-74 (2001); WILLIAM FINNEGAN, DATELINE SOWETO: TRAVELS WITH BLACK SOUTH AFRICAN REPORTERS (1988); WILLIAM A. HACHTEN & C. ANTHONY GIFFARD, THE PRESS AND APARTHEID: REPRESSION AND PROPAGANDA IN SOUTH AFRICA (1984); GORDON S. JACKSON, BREAKING STORY: THE SOUTH AFRICAN PRESS (1993); JOHN M. PHELAN, APARTHEID MEDIA: DISINFORMATION AND DISSENT IN SOUTH AFRICA (1987); RICHARD POLLAK, UP AGAINST APARTHEID: THE ROLE AND PLIGHT OF THE PRESS IN SOUTH AFRICA (1981); ELAINE POTTER, THE PRESS AS OPPOSITION: THE POLITICAL ROLE OF SOUTH AFRICAN NEWSPAPERS (1975); GERALD B. SPERLIN & JAMES E. MCKENZIE, GETTING THE REAL STORY: CENSORSHIP AND PROPAGANDA IN SOUTH AFRICA (1990); SOUTH AFRICA'S ALTERNATIVE PRESS: VOICES OF PROTEST AND RESISTANCE, 1880S-1960S (Les Switzer ed., 1997); SOUTH AFRICA'S RESISTANCE PRESS: ALTERNATIVE VOICES IN THE LAST GENERATION UNDER APARTHEID (Les Switzer & Mohamed Adhikari eds., 2000).

[9] Section 15 of the interim Constitution was written in a series of drafts by the Technical Committee on Fundamental Rights During the Transition, a group of lawyers and professors chosen in the

> 16. (1) Everyone has the right to freedom of expression, which includes—
> (a) freedom of the press and other media;
> (b) freedom to receive or impart information;
> (c) freedom of artistic creativity; and
> (d) academic freedom and freedom of scientific research.
> (2) The right in subsection (1) does not extend to—
> (a) propaganda for war;
> (b) incitement to imminent violence; or
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Three changes are most obvious: (A) the kinds of freedom of expression protected in Subsection 16(1) were widened to include "freedom to receive and impart information and ideas" and "academic freedom," (B) Subsection 15(2) protecting the state media from abuse was eliminated and (C) Subsection 16(2) was added directly to limit "propaganda for war," "incitement of imminent violence" and "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

The thinking behind the first and second changes is interesting in the discussion of the Assembly's attitude toward freedom of expression only in a most general way. The inclusion of "freedom to receive and impart information and ideas" and "academic freedom" was mainly a consequence of shifting terms from one section to another section of the Constitution, not new notions about freedom of expression. Similarly, the removal of the

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multiparty negotiations over the 1993 Constitution. The terms of Section 15 are common in international and foreign human rights instruments. The Technical Committee's records acknowledge that it was also influenced in drafting certain parts of Section 15 by unspecified documents and the Ad Hoc Committee on Fundamental Rights During the Transition. Each draft was examined by the Negotiating Council, which gave final approval. Lene Johanneseen's analysis of the Technical Committee's reports on the drafting process concluded that they "do not shed much light on the intention behind the drafting of the sections and thus they are not useful in determining how they are to be interpreted." Lene Johannessen, *Freedom of Expression and Information in the New South African Constitution and Its Compatibility with International Standards*, 10 S. AFR. J. HUM. RTS. 223 (1994).

protection for state media from undue state influence was primarily the result of the Assembly's decision to account for the same protection in other parts of the Constitution and legislation. None of the parties favored political influence in journalism in public media.[10] Therefore, the most relevant discussion focused on the third change, the exemptions from constitutional protection for freedom of expression.

Of obvious significance is the addition of the second subsection, placing limits on the constitutional protection of freedom of expression. These limits are recommended by United Nations conventions.[11] Although Subsection 2 is an important change, it actually masks the disparity among the Assembly's parties about what the Constitution should say about freedom of expression. A review of each party's position on the freedom of expression section at the time the constitutional convention began reveals these differences. These party positions are reviewed after each party's general political platform is presented to provide a broader sense of the ideology behind each position on the appropriate system of freedom of expression for South Africa.

Political Parties

The South African Parliament elected in 1994 contained seven parties which were represented in the Constitutional Assembly, the Constitutional Committee, the Constitutional Committee Sub-Committee and theme committees, as well as various other deliberating bodies, in proportion to the number of seats the parties held in Parliament. The parties and their numbers of members in the 490-member Assembly were: the African National Congress (312), National Party (99), Inkatha Freedom Party (48), Democratic Party (14), Pan-Africanist Congress (10), Freedom Front (5) and African Christian Democratic Party (2).[12]

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[10] Although the subsection on content regulation—the focus of this study--was perhaps of more interest to the parties than the subsection on state media, the Technical Committee and the parties seemed in agreement that the section on state media addressed an important concern that was at least ancillary to issues in freedom of expression. The history of the NP's venality and dominance of powerful state media to promote apartheid and ignore and condemn the liberation struggle taught strong lessons to the constitutional framers. The debate over how to ensure these media were fair was interesting, but not directly of interest to this research. The parties gradually agreed that the issue belonged in discussions that led to Section 192 in Chapter 9 of the 1996 Constitution, creating the Independent Authority to Regulate Broadcasting and a public broadcasting service that resembles those in Western nations.

[11] *See* INTERNATIONAL LAW GOVERNING COMMUNICATIONS AND INFORMATION (Edward W. Ploman ed., 1982). Indeed, the language in Subsection 2 is almost identical to that in the Universal Declaration of Human Rights. There was little debate in the South African Constitutional Convention over sections 2(a) and 2(b).

African National Congress. The ANC, led by President Nelson Mandela, was founded in 1912 by Africans who sought peacefully to fight discriminatory legislation enacted by the Union of South Africa. The ANC became a popular multiracial organization. As political conditions worsened, black nationalists became ANC leaders who took the group underground as the primary liberation force. The ANC was banned in 1960, and its leaders either fled or were killed, imprisoned, banned or deported. In 1961, the ANC became aligned with the South African Communist Party, founded in 1921 by white working class revolutionaries. Trade unions, a major strength in the liberation movement, have had strong influence on the ANC, often through the SACP. The purpose of the ANC was to destroy the apartheid state and replace it with a "united, non-racial, non-sexist and democratic South Africa in which people shall govern and all shall enjoy equal rights."[13] Elements of liberalism, Africanism and socialism persist in the Party's leadership and membership.[14] The ANC's views toward freedom of expression were reflected in the Party's 1988 constitutional guidelines and 1990 working draft of a bill of rights.

The 25-point Constitutional Guidelines for a Democratic South Africa[15] were organized into 10 sections, including a section called "A Bill of Rights and Affirmative Action," in which the ANC proposed that the future "democratic state shall guarantee the basic rights and freedoms, such as freedom of association, thought, worship and the press ... " subject to laws forbidding the "advocacy or practice of racism, fascism, nazism or the incitement of ethnic or regional exclusiveness or hatred."

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[12] *See* CONSTITUTIONAL ASSEMBLY, ANNUAL REPORT (1995).

[13] African National Congress Web site, *available at* http://www.anc.org.za/ancindex.htm.

[14] *See* TIMOTHY D. SISK, DEMOCRATIZATION IN SOUTH AFRICA: THE ELUSIVE SOCIAL CONTRACT 149-58 (1995).

[15] Afr. Nat'l Cong., *Constitutional Guidelines for a Democratic South Africa*, 5 S. AFR. J. HUM. RTS. 129-32 (1989).

The Constitutional Committee appointed by the Party's Executive Committee generated in 1989 a "working draft" of a proposed Bill of Rights.[16] Paragraph 1 of Article 4 averred that "There shall be freedom of thought, speech, expression and opinion, including a free press." Other articles provided for "freedom of association, including the right to form and join trade unions," "freedom of artistic activity and scientific enquiry, without censorship" and wide expression rights for trade unions. The draft constitution, however, also (1) commanded that the media "shall respect the right to reply," (2) protected citizens from "sexual harassment, abuse and violence," (3) created a duty for the media to "discourage sexual and other types of stereotyping" and a duty for "public and private bodies ... to prevent any form of incitement to racial, religious or linguistic hostility," and (4) enabled the state to pass laws "prohibiting the circulation or possession of materials which incite racial, ethnic, religious, gender or linguistic hatred, which provoke violence, or which insult, degrade, defame or encourage abuse of any racial, ethnic, religious, gender or linguistic group."

In a submission to the Constitutional Assembly, the ANC proposed that the section on freedom of expression in the provisional constitution be "reformulated to … [remove] constitutional protection from racist, sexist or hate speeches calculated to cause hostility and acrimony, and, racial, ethnic or even religious antagonism and division." The ANC sought a Subsection 2: "Any speech, expression or advocacy of national, racial, ethnic, religious or other forms of hatred that constitutes incitement to racial, ethnic or gender discrimination, hostility or violence is forbidden."[17]

Despite denial of fundamental civil rights to black South Africans during apartheid, the ANC's long-standing political catechism to eradicate inequality understandably prompted a freedom of expression ideology that would qualify protection for hate expression.

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[16] Afr. Nat'l Cong., *A Bill of Rights for a Democratic South Africa--Working Draft for Consultation*, 5 S. AFR. J. HUM. RTS. 110-213 (1989).

[17] Afr. Nat'l Cong., Preliminary Submissions of African National Congress on Blocks Two and Three--Theme Committee 4: Freedom and Security of the Person 2 (Apr. 2, 1995).

National Party. The NP, led by former President F.W. de Klerk, represented principally white moderates and conservatives. The party of apartheid, the NP reformed itself with a restrained agenda for the 1995 national elections. The NP favored a written bill of rights, including protection for freedom of expression and judicial independence, but the NP's primary emphasis was on decentralizing any new national government and providing guarantees for mandatory participation by minority parties—of which the NP was an example—in the executive branch of government.[18] Still, the NP proposals for a Bill of Rights and freedom of expression section were full, largely driven by NP-initiated recommendations by the South African Law Commission dating to 1989.[19]

In Section 9, called "Political Rights," the Government's "Draft Charter of Fundamental Rights" said: "(1) Every person shall have the right to freedom of speech and other forms of expression, and the right to obtain and disseminate information. (2) Subsection (1) shall not preclude the registration and licensing of newspapers and other forms of communication."[20]

In its first submission, the NP otherwise supported the "broad and inclusive approach followed in drafting the provisional bill of rights." The right may be curbed to regulate hate, commercial and obscene expression, but this should be done through statute, as applied by courts when balancing freedom of expression against other rights, including "rights such as human dignity, privacy, fair trial, property, abuse of children."[21]

Unlike the ANC, which saw the bill of rights as a way to empower the disempowered, the NP viewed it as a tool to restrict the new ANC-led government from disempowering the propertied interests.

Inkatha Freedom Party. Like the NP, the IFP, whose constituency was mostly rural Zulu in eastern South Africa, favored a loose federation form of government over a strong central government and constitutional insulation for traditional law and custom.[22] The Party protested the refusal of the Assembly to submit some issues to international mediation by boycotting the Assembly deliberations beginning in April 1995. The IFP's involvement in the design of the Constitution consisted of submissions on various issues.[23] The IFP favored protection of civil and political rights but was ambiguous about why or how they were to be protected.[24] Of the seven parties, only the IFP opposed the final Constitution.[25]

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[18] *See* SISK, *supra* note 14, at 134-41.

[19] *See* LOURENS M. DU PLESSIS, AN INTRODUCTION TO LAW 166 (2d ed. 1995).

[20] *See* LORENZO TOGNI, THE STRUGGLE FOR HUMAN RIGHTS: AN INTERNATIONAL AND SOUTH AFRICAN PERSPECTIVE 149 (1994).

[21] Nat'l Party, National Party Preliminary Submission, Theme Committee 4, Block 4, Item 7: Freedom of Expression (1995).

Section 19 of the KwaZulu Natal Constitution, written by IFP leaders, protects "Freedom of Communication": "(a) All persons shall be free to express and communicate their thought in private and in public, in oral, written, visual or any other fashion, and to establish institutions for such a purpose. All forms of censorship or limitation on the contents of such communications shall be prohibited." Subsection b provides limited protection for commercial speech, Subsection c establishes a "time, place and manner" system of limitation on expression, and Subsection d protects a person from forced disclosure of "his or her ideology, creed, religious belief, or political opinions." Section 24, "Freedom of the Media," states:

> Anyone has the right to publish and distribute printed materials. The press and the media of mass communication shall have the right to inform the public on matters of public interest provided that they do not publish erroneous information as a result of gross professional negligence or malice. The media have the duty to rectify all erroneous information they publish which damages the reputation of others.

Section 59, "Media of Mass Communication," permits "anyone" the "right to establish media" and requires state media to provide access to citizens and political parties.[26]

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[22] *See IFP Seeks Strong Provincial Government*, CONST. TALK, Jan. 13-26, 1995, at 2.

[23] *See Towards a New Constitution*, CONST. TALK, June 30-Aug. 10, 1995, at 1, 3.

[24] *See* SISK, *supra* note 14, at 144-49.

[25] *See* S. Afr. Press Ass'n, *Buthelezi Slams Constitution Signed by Mandela on Tuesday*, Dec. 10, 1996.

[26] *See* TOGNI, *supra* note 20, at 162, 263, 269.

The IFP was more interested in preserving its territory of influence as an ethnic enclave than in dealing with the specifics of individual rights such as freedom of expression. The IFP's policies regarding freedom of expression were, on paper, relatively moderate.

Democratic Party. The DP established a long tradition of white liberal opposition to the much larger group of the NP's conservative whites.[27] Still, the DP represented a disproportionate share of political power since the Party's constituency included leaders of most of the largest businesses, the news media and major professions, such as intellectuals and lawyers. The DP's priorities in the Assembly were federalism, human rights and a strong and independent judiciary.[28] The DP was the strongest Assembly advocate of protection for first-tier political rights, especially freedom of expression.

The DP's initial submission was a spirited defense of an unqualified freedom of expression section, calling a "constitutional guarantee of free speech, in the widest possible terms, coupled with a strong injunction against state intervention in the press … the minimum prerequisites for a creative, vibrant, open democracy in South Africa." The DP insisted that the regulation of commercial and hate expression could best be accomplished through the general limitations section of the constitution.[29] The DP added:

> However, we urge that the constitution framers desist from the temptation of applying a wide basis of potential restrictions to free speech, however well-motivated such an intention might be. The lessons of our own past and the tortuous development of free expression in such a well-established democracy as the United States, for example, should serve as a necessary caution. In other words, free speech should be cherished and nurtured and is very easily chilled or subdued by excessive constitutional or judicial zeal.[30]

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[27] *See* DEMOCRATIC LIBERALISM IN SOUTH AFRICA (Jeffrey Butler et al. eds., 1987).

[28] *See Keep It Liberal, Democratic and Federal*, CONST. TALK, Jan. 13-26, 1995, at 1, 2.

[29] Democratic Party, Democratic Party Submission on: Topic 6: Freedom of Expression, Theme Committee 4, Fundamental Rights (1995). The general limitation section of the South African Constitution, like the Canadian Constitution, creates for courts a balancing of interests test in civil rights and liberties cases that is implied in the U.S. Constitution and that has been used by the U.S. Supreme Court for many years in free expression cases. Including explicit prohibitions of hate expression in the South African Constitution meant that such a balancing test would disfavor those who argue their rights to freedom of expression are violated by prosecutions for hate expression.

[30] *Id*.

The news media, according to the DP, should have full constitutional protection in their exercise of press freedom. The DP argued that constitutional law should provide protection for parties in common law disputes, for example, the press when sued for libel, a purely common law matter in South Africa. Further, the DP maintained, freedom of expression of all kinds, not just political expression, should enjoy maximum protection in the Constitution. The DP argued that any constitutional provision permitting regulation of hate expression was dangerous because it "could be used as a weapon to wipe out dissent."[31]

Like property rights advocates in the United States, DP leaders viewed the Bill of Rights as a way to protect individual interests from government interference. The DP understood that a strong right of freedom of expression is one of the principal means that can be used to fend off official intrusion into the private sector.

Pan Africanist Congress. ANC Africanists broke away to form the socialistic PAC when the ANC adopted a multiracial philosophy. A militant force during the liberation struggle, the PAC suffered from lack of leadership and organization in postapartheid South Africa. The PAC's major issue was land reform.[32] The Party favored a Bill of Rights, including a provision for freedom of expression, but opposed group or minority rights.[33]

The PAC's first submission on freedom of expression was terse, suggesting that hate expression should be unprotected, but "strict controls of a paternalistic Apartheid State" on "obscene speech and pornography" are unnecessary. "Although there should be limits, they should be reasonable and flexible and most controls should be left to society's own conscience and standards." The PAC would permit advertising but its content should be subject to "reasonable limits" as "society develops its own standards and levels of tolerance."[34] Except for the Party's exclusion of hate expression from any constitutional protection, this submission on freedom of expression suggests the PAC is among the most libertarian of the parties. On the other hand, the one-page submission is too brief to categorize.

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[31] Theme Committee 4, Minutes of Meeting, 5.4 (Apr. 19, 1995).

[32] *See* Saths Cooper, *The PAC and AZAPO, in* ELECTION '94 SOUTH AFRICA 117-20 (Andrew Reynolds ed., 1994).

[33] *See* SISK, *supra* note 14, at 159-62.

[34] Pan-Africanist Cong., Preliminary Submission of the PAC on Freedom of Expression (1995).

Freedom Front. The right-wing FF generally represented Afrikaners—at least some of whom were unapologetic about apartheid policies—seeking as much self-rule as might be politically possible in the new order. The FF favored a bill of rights and protection for freedom of expression, but emphasized protection for group rights more than the other parties.[35]

The FF in its submission on freedom of expression quoted approvingly the European Convention on Human Rights as a basis for circumscribing freedom of expression on the grounds of national security, territorial integrity, public safety, prevention of disorder or crime, discouraging disclosure of confidential information and maintaining judicial integrity and authority. The FF also supported parts of the International Covenant on Civil and Political Rights that required freedom of expression to respect the right of reputation and states' abilities to protect public health and morals. Further, the FF desired legislation to regulate obscenity and commercial expression.[36]

The FF also wanted it made clear that constitutional protection for "artistic creativity and scientific research" should not be used as "pretexts for modes of expression that are obscene or offensive to the public generally or to any group in society with lawful aims." In addition, the FF wished to establish "an independent media commission" to regulate all public and private media to ensure their impartiality, diversity of opinion and maximum dissemination of news. The FF also sought another commission to study all laws regulating the media and recommend which ones should be repealed or retained.[37]

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[35] *See Volkstaat High on FF's Agenda*, CONST. TALK, Jan. 13-26, 1995, at 1, 6-7.

[36] Freedom Front, Theme Committee 4 (Fundamental Rights), Submission on Freedom of Expression 1-5 (1995).

[37] *Id.*

Nevertheless, the FF extolled the crucial place for freedom of expression in the new South Africa, devoting several pages of the Party's submission to the vital purpose of especially the press in a democracy. Still, a biased press, inspired by parties and other partisan interests, "may cause incalculable damage to society." Despite all of the risks the FF found associated with generous allowance for freedom of expression, the Party recommended that "the chapter on fundamental rights should contain only a brief statement of principle in support of the freedom of the press, as an important component of freedom of expression generally" because a bill of rights cannot "spell out the details of this balance: it is the function of the courts to do so over the years in the course of their interpretation of the provisions of the bill of rights." The FF favored hate expression regulation, but no exclusion of its protection in the Section on freedom of expression.[38]

Contradicting all of its explicit and implicit suggestions for regulation of aspects of the right of freedom of expression, however, the FF concluded that the South African Parliament should be made incapable of regulating freedom of expression in any way, "not even in accordance with the provisions of a limitation clause in the bill of rights." The FF said its "motivation is that freedom of expression is one of the main pillars of a democracy, to be securely entrenched in the Constitution and not subject to erosion by subsequent ordinary legislation."[39] If taken seriously, the FF's conclusion would position the Party as more supportive of freedom of expression than any other party. Given the FF's recommendations for regulating the press, however, the conclusion cannot be taken seriously.

African Christian Democratic Party. The ACDP, a Christian fundamentalist party, maintained that the Bible should provide the philosophy for designing the constitutional democracy and Bill of Rights.[40] "The ACDP stands for "Christian principles, freedom of religion, an open market economy, family values, community empowerment and human rights in a federal system."[41] The Party supported freedom of expression, but advocated severe limitations on what the ACDP saw as immoral, especially violent and pornographic, expression.

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[38] *Id.*

[39] *Id.*

[40] *See Supreme Laws of God Must Prevail--ACDP*, CONST. TALK, Jan. 13-26, 1995, at 1, 17-18.

The ACDP submission on freedom of expression underscored the Party's commitment to "God's divine plan" in drawing the new Constitution and Bill of Rights. To avoid what the Party saw as the decay of South African society resulting from unrestrained freedom of expression following apartheid rule, the ACDP called for regulation of dehumanizing pornography driven by "blatant economism." The ACDP, contending that censorship was inevitable and it should be handled responsibly, suggested that it be "based upon biblical values where the rules laid down for civil law and government is based in Christian morality."[42]

"We in the ACDP believes [sic] that freedom of expression should also include the right of censorship" or the regulation of "those expressions that can be classed as defamatory, obscene or profane, ... portrayals of the horrors of child abuse, pornographic liberties, sacrilegious activities, desecration of state symbols," and "abuse of the freedom of expression, whether it be hate speech, immoral 'acts' or obscenity" and pornography. Blaming so-called sexual liberation, including pornography, for the decline of morality in American society, the ACDP maintained that morality and decency should be the standards for determining the reach of freedom of expression in South Africa.[43]

The Constitutional Process, 1993-96

In its Schedule 4, the 1993 Constitution established procedures and deadlines and listed 34 constitutional principles to guide the six phases of negotiations over the permanent Constitution. The Constitutional Assembly, led by a 44-member Constitutional

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[41] Afr. Christian Democratic Party, Web site, *available at* http://www.acdp.org.za.

[42] Afr. Christian Democratic Party, Submission to Constitutional Assembly, Theme Committee Four, Freedom of Expression (1995).

[43] *Id.*

Committee,[44] was established on May 24, 1994 with a goal for completion in January 1995, and organized into six 30-member committees addressing different themes, such as Theme Committee 4 which studied fundamental rights, including freedom of expression.[45] The theme committees also formed subcommittees and commissions of constitutional experts and Assembly members for special studies. The interim constitution also provided for an Independent Panel of Constitutional Experts to resolve difference that could not be settled in the Assembly.[46]

While the positions on freedom of expression staked out by the parties were reasonably clear and distinct, the deliberations over Section 16 can be described as predictable, cumbersome and vague. To understand what transpired requires understanding that, first, the Bill of Rights and the freedom of expression section--partly because all of the parties supported civil rights and liberties--were not major areas of concern, especially in comparison to how the Constitution would divide power, particularly in whether and how it would be centralized or decentralized. Second, the ANC dominated the convention, but the Party's members are not necessarily of one mind on all issues. Members included communists, socialists, labor activists, Africanists, liberals as well as moderates. How ANC delegates saw issues such as freedom of expression likely was varied. Third, the NP and, to a lesser extent, the DP, proved to be political adept at the convention despite their comparatively small delegations. Students of the convention agree that while the ANC emerged with power firmly in hand, the parties that were officially legitimate during apartheid era won surprising concessions.[47]

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[44] In the autumn of 1995 when members of the Constitutional Committee realized that the Assembly was unlikely to meet its deadline of May 1996 for completion of the Constitution, a 12-member Sub-Committee was created to continue negotiations over contentious issues, including the Bill of Rights, during the Assembly's recess September 15, 1995-January 15, 1996. The Constitutional Committee also continued meeting during the recess. *See* CONST. ASSEMBLY, ANNUAL REPORT 1996 at 8 (1996); *Towards a New Constitution*, CONST. TALK, June 30-Aug. 10, 1995, at 1; *New Subcommittee to Speed Up CA Process*, CONST. TALK, Aug. 11-Aug. 25, 1995, at 1-2; *Deadline to be Met*, CONST. TALK, Nov. 2, 1995, at 1-2.

[45] Many of the issues of freedom of expression were considered by Theme Committee 4, but much serious deliberation on the Bill of Rights was performed by the Constitutional Sub-Committee. Other theme committees occasionally dealt with aspects of the question. For example, Theme Committee 1 on representative government, citizenship and suffrage unanimously agreed that freedom of expression was important to the system of government. *See Rights and Duties*, CONST. TALK, Aug. 11-25, 1995, at 4.

[46] *Id.*

Maximum protection for freedom of expression turned out to be one the DP's highest priorities, and it lobbied Theme Committee 4 for absolute protection for freedom of expression more aggressively than the ANC lobbied to exclude any form of hate expression from constitutional protection. Those positions held firm throughout the committee's deliberation. The other parties hardly were noticed in the debates over freedom of expression. The NP tried to push its concerns, but these were marginalized in the committee by the DP's eloquence and energy and the ANC's size. Eventually, the NP grew silent or sided with the DP in several of the debates. Subsumed by decisions in higher-order committees were some key issues for the committee, such as whether Section 16 could be used as a defense in libel cases, whether it protected organizations as well as individuals and whether it could be applied against non-governmental organizations as well as the government.[48]

By June 1995, Theme Committee 4 reported to the Constitutional Committee that it had resolved several general matters respecting the right of freedom of expression but had deadlocked on several other issues, most significantly on what kinds of expression should have limited constitutional protection. At this stage, the DP favored no limitations, the NP favored protection only for political expression, the ANC favored no protection for hate expression (explicitly opposed by the FF, NP and DP), the PAC favored limitations on only commercial expression and the ACDP favored limitations on immoral expression.[49]

Although it did not favor regulation of hate expression, the DP pointed out that it could be regulated by legislation without excluding it from protection in the Constitution.[50]

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[47] *See* GLOPPEN, *supra* note 4; SISK, *supra* note 14.

[48] The answers to these questions generally are yes.

[49] *See* Constitutional Assembly, Theme Committee 4, Fundamental Rights, Report and Draft Formulation, Freedom of Expression 6-7 (June 21, 1995).

[50] Constitutional Assembly, Minutes of Management Committee Meeting 4, 9 (June 22, 1995).

The ANC, however, was resolved to introduce hate expression prohibition into the Bill of Rights. ANC delegate Kader Asmal argued:

> There is tension between freedom of expression and hate speech. It is important to take into account the context in which this constitution is being drafted to ensure that it reflects the nature of society and is not merely academic. The issue of racism is central. Not to deal with it is to deny the heart and soul of the nation. The intention is not to interfere with privacy or private conscience. But no one should have the right to advocate racial discrimination. It is my strong conviction that not to deal with behaviour that leads to concrete acts of violence is hardly artificial.[51]

The Constitutional Committee recommended that the issues be referred to technical advisers who, citing provisions in various international human rights instruments, recommended that the South African constitution not protect hate expression to be consistent with prevailing international law.[52]

Although still campaigning against any constitutional limitation on hate expression, the DP and NP began negotiating in October 1995 with the ANC on language in the hate expression subsection,[53] but a stalemate remained until February 1996, when the Panel of Constitutional Experts issued a memorandum on hate expression which critically analyzed classic libertarian free expression theory. The Panel argued:

> [W]ords are *not merely abstract*. Speech is action, which can be used for a variety of aims, including to intimidate, suppress, injure, or eliminate others. "Hate speech" could amount to a direct *assault* on the dignity and equality of others. The fact that something is "expression does not mean that it should be *constitutionally protected expression*. It could, e.g., be argued that forms of expression which are not related to, or which even offend the above-mentioned underlying reasons for the recognition of free expression, do not deserve protection. "Hate speech" which may well be self-fulfillment, but is aimed at stifling or stultifying the self-fulfillment of others, which does not attempt to contribute to any "search for truth", or which is aimed at destroying democracy rather than enhancing it, militates against the very reason for the protection of free expression. To rely on the right and the ideal of freedom of expression in such a case amounts to abusing and undermining freedom of expression. Furthermore, all people

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[51] *How Free Can Speech Be?*, CONST. TALK, June 30-Aug. 10, 1995, at 10.

[52] 2 Constitutional Assembly, Constitutional Committee Sub-Committee, Draft Bill of Rights 64, ns.2-4 (Oct. 9, 1995).

[53] *See* Constitutional Committee, Supplementary Memorandum on the Draft Bill of Rights of 9 October 1995 and Party Submissions 4-5 (Oct. 19, 1995).

> are obviously not always free to express themselves and to "fight it out" as equals in a "market place of ideas". It is also clear that the history of and socio-political circumstances prevailing in a society have a direct influence on its ability and willingness to tolerate varying degrees of "hate speech". Finally, in spite of the accepted importance of freedom of expression, it is not an absolute right in any society.[54]

Ultimately, this and yet another panel, however, concluded that the decision on whether to exclude hate expression from the Constitutional protection was political, the function of the Assembly.[55]

Finally, in March 1996, the ANC compromised by offering a "harms" test for when hate expression may be regulated. The ANC proposed that instead of regulating hate expression that causes discrimination, section 15(2)(c) would exclude protection for such expression that provably causes harm to individuals or society.[56] The DP admitted the proposal was a "major improvement" and offered to negotiate with the ANC further, but the ANC responded that it would make no further concessions,[57] throwing the Sub-Committee into a deadlock. After more stalling, the Subcommittee could only decide to refer to the matter to "Sub-Committee 1," a new group established by the Assembly leadership to resolve outstanding differences through "multi-party" negotiations between the delegations. On April 1, Sub-Committee 1 adopted Section 16(2)(c), specifically limiting protection for hate expression using the compromise "harms" clause.[58] The Constitutional Assembly adopted the Constitution, including the freedom of expression section, on May 8, 1996.[59]

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[54] Panel of Constitutional Experts, Memorandum Re: The Constitutional Protection of Freedom of Expression and "Hate Speech" (Section 15) 4-5 (Feb. 1, 1996).

[55] *See* Panel of Experts, Memorandum for Discussion Purposes at Workshop/Multilateral 3 (Feb. 20, 1996).

[56] *See More Debate on Freedom of Expression*, CONST. TALK, Mar. 28, 1996.

[57] Constitutional Assembly, Draft Report, Constitutional Committee Sub-Committee Meeting 2.10.2(i)-(iii) (Mar. 12, 1996).

[58] Constitutional Assembly, Draft Report, Multi-Lateral Discussions, Sub-Committee One, Bill of Rights 6.2 (Apr. 1, 1996).

[59] Constitutional Assembly, Republic of South Africa, Constitution of the Republic of South Africa 1996, as adopted by the Constitutional Assembly on 8 May 1996. The Constitutional Principles of the Constitution of 1993 required that the Assembly's Constitution be certified by the South African Supreme Court. The Court refused to certify the Constitution on several grounds, none directly addressing the freedom of expression section. In re: Certification of the Constitution of the Republic of South Africa,

Discussion

Although all of them supported freedom of expression in the abstract, the seven parties, each one differing somewhat from the other, represented four general predilections toward (and ultimate conclusions about) freedom of expression, each a function of a larger ideology: (1) The liberal position, adopted by the DP, which sought primarily popular sovereignty, a free market economy, limited central and strong provincial government, and unqualified "negative" freedoms, particularly freedom of expression,[60] (2) the consociational position adopted in modified forms by the NP, IFP and FF which sought a decentralized federation and a strong emphasis on collective rights with virtual disinterest in individual rights, including freedom of expression, (3) a moralistic position, adopted by the ACDP, which sought democratic government taking strong religious stands on all issues, including issues in freedom of expression and (4) a qualified postmodern position, adopted by the ANC, which emphasized a large and strong central government and a balance between distributive justice, especially protection from inequality, and individual rights, including freedom of expression.

The DP emphasized the good that freedom of expression can bring to society while the ACDP stressed the evil that freedom of expression can cause for South Africa. The ANC, with motivations distinct from each of the DP and ACDP, saw different goods and evils of freedom of expression. A dimension of the tension was the conflicting priorities of the values of equality for the ANC and PAC and freedom for the NP and DP.[61] The IFP, FF and, to a lesser extent, the NP found the issue of freedom of expression to be so incidental to their higher priorities that they offered little more than platitudes about it. The result of the collision of these perspectives for constitutional provisions for freedom of

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1996 S.A. 744 (CC) (1996). The Assembly revised the Constitution to meet the Court's requirements on Oct. 11, 1996. The Court certified the Constitution on Dec. 4, 1996. Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, No. CCT 37/96 (1996).

[60] *See* DEMOCRATIC PARTY, CONSTITUTIONAL POLICY (1996); SISK, *supra* note 14, at 141-43.

[61] *See* DU PLESSIS, *supra* note 19, at 169.

expression, like the institutional and other choices made by the Constitutional Assembly, was a mixture of the ideological preferences of especially the dominant parties. The ANC and NP got less than they wanted in the Constitution generally and in the Bill of Rights specifically, and the DP was somewhat successful in playing power broker between them.[62] Like debates over the Bill of Rights generally, the debates over the freedom of expression section were less contentious than they could have been.

In the end, no party's platform could be said to resemble Section 16 of the permanent constitution. All of the parties praised freedom of expression as important to South African democracy, and none of the parties proposed an oppressive Soviet, developmental or other authoritarian system of freedom of expression. Yet the priorities on certain freedom of expression issues, evident in the preconvention platforms of the parties, were not realized in Section 16. The ANC's preconvention proposals harshly to regulate hate expression, including the mere possession of material insulting to virtually any group, were reduced to a moderate, internationally centrist exclusion from constitutional protection of only hate expression that provably causes actual harm. The NP's hope to permit licensing of newspapers was doomed from the start of the Assembly proceedings. The DP's push for absolute protection for free expression probably helped to deter proposals by other parties for severe forms of regulation but failed in the face of the ANC's campaign to exclude protection for hate expression. The broad policy of censorship of "immoral" expression advanced by the religious doctrines of the ACDP was readily rejected by the Assembly; even obscenity was not excluded from constitutional protection. Meeting a similar fate was the FF's plan to create a government commission to ensure that all public and private media content was impartial.

Perhaps most interesting was the failure of the ANC, whose delegation numerically dominated the Constitutional Assembly, to realize the Party's policy goals for freedom of expression in Section 16. In their analysis of the South African constitutional deliberations more generally, Sisk and Gloppen suggest that the ANC underestimated the political acumen of the NP.[63] Distracted by larger issues concerning how power would be entrenched in the new government, the ANC also was surprisingly out-maneuvered by the tiny DP delegation during aspects of the Assembly proceedings regarding freedom of expression. The result was a moderately libertarian constitutional section that features mainstream values embraced by the international community but not a constitutional provision that represents the special circumstances of freedom of expression in South Africa. The protracted, tumultuous history of oppression and suppression in South Africa seems to have had no distinctive impact on the language in Section 16.

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[62] *See* SISK, *supra* note 14.

There is no doubt that contemporary South Africa has a system of freedom of expression in place that far exceeds the former apartheid state's violent system for resolving civil conflict. The levels and types of South African freedom of expression are as vibrant as those in western democracies and easily surpass the systems in place in other African states. Case law enunciated by the South African Constitutional Court will perhaps refine and make distinctive the system born in the clashes between the political parties in the Constitutional Assembly.

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[63] *Id.*; GLOPPEN, *supra* note 4.

Protecting a Delicate Balance:
Facts, Ideas, and Expression in Compilation Copyright Cases

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Protecting a Delicate Balance: Facts, Ideas, and Expression in Compilation Copyright Cases

I. Introduction

Copyright law has embedded within it a peculiar ambiguity. It is designed, in essence, to encourage creativity for the public benefit by suppressing, for a time, the public's use of creative works. The tension between benefit and suppression is built into the very constitutional provision authorizing Congress to create copyright and patent statutes. The provision allows Congress "To promote the Progress of Science and the useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."[1] Thus the constitutional text focuses less on the recognition of some natural right than on a utilitarian balance designed to encourage authors to create works for the public benefit by offering them a limited statutory monopoly.

That balance between incentive and public benefit has been the source of continuing controversy in copyright doctrine. A number of doctrines have emerged to protect the proper balance, as well as to safeguard interests associated with free expression. Two of the most important such doctrines are the idea/expression doctrine and the fact/expression doctrine. Under the former, authors can obtain copyright protection for their expression of ideas, but the ideas themselves, even highly creative ideas, remain in the public domain. Under the latter, facts are uncopyrightable, although an author's particular expression or description of those facts can be protected.

In recent years, federal courts have decided a number of cases that have cast some doubt on the scope of the idea/expression and fact/expression doctrines. Those cases, involving attempts to protect compilations of facts, databases, and the like, actually may pose a danger to the continued vibrancy of the idea/expression and fact/expression doctrines. This paper seeks to examine some of the most influential of these decisions and critique some of the approaches they espouse. The paper will first set forth some basic copyright principles, with particular attention to a key U.S. Supreme Court case decided in 1991, *Feist Publications, Inc., v. Rural Telephone Service, Co., Inc.*[2] Next, the paper explores and analyzes some key post-*Feist* lower court decisions that seem to be misinterpreting *Feist* and related doctrine. Finally, the paper will offer a brief concluding perspective on this difficult area of the law.

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[1] U. S. Const., art. I, sec. 8, cl. 8.

II. Some Basic Principles

One of the fundamental principles of copyright law is that neither facts nor ideas are copyrightable, only a particular expression of those facts or ideas. So, for example, the fact that the human body has a certain structure is not copyrightable, although a book or article about that structure would be copyrightable based on the author's unique expression or presentation of that information. Likewise, an idea -- such as the plot structure boy meet girl, boy loses girl, boy and girl are reconciled and live happily ever after -- is not copyrightable, although if an author gives names to the boy and girl, and provides a plot, scene, and other details, the resulting expression may be copyrighted. The fact/expression and idea/expression dichotomies, along with the fair use doctrine, are generally regarded as important statutory protections for various free expression interests that might otherwise require independent protection via the First Amendment. As one treatise noted of the idea/expression dichotomy: "It has been said that copyright does not significantly interfere with the First Amendment because it protects only the form of expression contained in the copyrighted work and allows the author's ideas to circulate freely."[3] In *Harper & Row v. Nation Enterprises*, the U. S. Supreme Court stated that First Amendment interests are "already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use."[4]

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[2] 499 U.S. 340 (1991).

[3] Marshall Leaffer, Understanding Copyright Law 78 (3d ed. 1999) (citing Nimmer on Copyright @1.10 (1999)). *See also, e.g.*, Melville B. Nimmer, Does Copyright Abridge the First Amendment Guaranties of Free Speech and Press?, 17 U.C.L.A. L. Rev. 1180 (1970).

While the general outlines of the fact/expression and idea/expression dichotomies are clear enough (and explicitly recognized in the language of the 1976 Copyright Act)[5], the application of these dichotomies to particular cases is often problematic. This has been particularly true, one might argue, in cases involving copyrighted compilations of otherwise unprotected facts.

The most important recent U.S. Supreme Court decision on these matters is unquestionably the 1991 case *of Feist Publications, Inc., v. Rural Telephone Service, Co., Inc.*[6] In *Feist*, the Court held that a factual compilation lacking sufficient originality was not eligible for copyright protection and thus a competitor who borrowed from the compilation was not an infringer.

The *Feist* case began when Feist Publications, a publisher of area-wide telephone directories, sought to obtain a license to use local white-page telephone listings from Rural Telephone Services Co., a local telephone service provider in northwest Kansas. Rural declined to license its listings to Feist, which proceeded to use the listings in its own publication notwithstanding Rural's refusal. Feist also had its personnel check the listings and obtain street addresses for the telephone subscribers in Rural's listings.

Rural brought a copyright infringement suit in federal court and was granted summary judgment by the trial judge. That ruling was affirmed by the U.S. Court of Appeals for the Tenth Circuit.

On appeal, the U. S. Supreme Court reversed the finding for Rural. The Court noted the "undeniable tension" between two key proposition: "The first is that facts are not copyrightable; the other, that compilations of facts generally are."[7] To resolve this tension, the Court pointed out that the reason facts cannot be copyrighted is that they were not independently created by an author -- that is, they were not original. Originality, or independent creation, is the essential component of any copyrightable work, together with some minimal degree of creativity. This originality, the Court noted, has been held by past Court decisions[8] to be mandated by the Constitution's Copyright Clause, which allows Congress to "secure for limited Times to Authors . . . the exclusive Right to their respective Writings."[9]

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[4] 471 U.S. 539, 560 (1985).

[5] The Act states that "in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, methods of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. @102 (b).

[6] 499 U.S. 340 (1991).

[7] *Id.* at 344.

Because originality is a constitutional requirement, the Court reasoned, facts clearly are not eligible for copyright protection. Facts are simply reports about the world; they are not the original creations of an author. As the Court pointed out: "The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. . . . Census takers, for example, do not 'create' the population figures that emerge from their efforts; in a sense, they copy these figures from the world around them."[10]

Even thought facts *qua* facts are uncopyrightable, compilations of those facts may be copyrighted if they are sufficiently original, the Court stated. "The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimum degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws."[11] A caveat to that protection, the Court noted, is that copyright protection in compilations is "thin." Protection extends only to the selection and arrangement of the facts, not to the underlying facts themselves. Later authors would be free to use the raw facts; those later users would simply be limited in borrowing from the selection and arrangement of the original compiler. The Court noted that this "thin" or limited protection might seem unfair if the original compiler had exerted great effort in obtaining the facts. However, the Court stated, this result was not a mere legal anomaly, but an intended and socially beneficial result of the Copyright Clause: "The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.' To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."[12] Copyright's bargain provides protection to authors in exchange for creative works whose facts and ideas become a part of the public domain for the benefit of all.

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[8] The Trade-Mark Cases, 100 U.S. 82 (1879); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884).

[9] U.S. Const., Art. I, sec. 8, cl. 8.

[10] 499 U.S. at 347 (citing Denicola, Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works, 81 Colum. L. Rev. 516 (1981)).

[11] *Id.* at 348.

With its focus on constitutionally required originality, the Court repudiated a theory adopted by a number of federal courts -- the "sweat of the brow" theory, sometimes known as the "industrious collection" theory. The "sweat of the brow" theory maintained, as the name suggests, that copyright protection was an appropriate reward for the labor expended in collecting facts. Protection under this theory extended to the raw facts the compiler had gathered. Later compilers were compelled to seek out those facts independently if they wished to avoid liability for infringement. Such a theory, the *Feist* Court maintained, was simply at odds with the basic, constitutionally compelled principle that facts themselves could not be protected.

The Court pointed out that the statutory definition of "compilation" found in the 1976 Act echoed the constitutional principle that facts remained part of the public domain. Section 101 of the Act defines a compilation as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." The statutory language thus emphasized both the fact/expression dichotomy and the requirement of originality in selection or arrangement that is the prerequisite of copyrightability for compilations. This latter point made it clear that some compilations would not merit legal protection. Moreover, Section 103 (b) of the Act further emphasized that a compilation copyright "extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material."

Given these legal requirements, the Court proceeded to find that Feist had not infringed Rural's telephone directory. The subscriber names, towns, and telephone numbers that Feist copied from Rural's directory were not "original" works of authorship, the Court held. "Rather, these bits of information are uncopyrightable facts; they existed before Rural reported them and would have continued to exist if Rural had never published a telephone directory."[13] Moreover, the Court held, Rural's selection, coordination, and arrangement of these pre-existing facts was also not copyrightable. Although the facts were not required to be presented in an "innovative or surprising way" to warrant protection, the originality requirement did impose a minimal burden on the compiler: the "selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. The standard of originality is low, but it does exist."[14] Here, Rural simply provided a telephone number to all who applied, and then listed those subscribers in alphabetical order in its white pages. The Court described this selection and arrangement procedure as "devoid of even the slightest trace of creativity."[15]

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[12] *Id.* at 349.

[13] *Id.* at 361.

The fact/expression dichotomy is not the only copyright principle that reserves some key elements of creative works to the public domain. The similarly named idea/expression dichotomy stands for the related proposition that ideas themselves, however original, are not subject to copyright protection, but only the manner of their expression or presentation. Ideas are always and already in the public domain, even if they are wholly original to a particular author. As the authoritative Nimmer treatise explains this principle: "The policy rationale underlying the Act's exclusion of ideas from copyright protection is clear. To grant property status to a mere idea would permit withdrawing the idea from the stock of materials that would otherwise be open to other authors, thereby narrowing the field of thought open for development and exploitation. This effect, it is reasoned, would hinder, rather than promote, the professed purpose of the copyright laws, i.e., 'the progress of science and useful arts.'"[16] The Nimmer treatise goes on to point out that the fundamental rationale behind the very idea of copyright protection is to entice authors to share ideas that may prove intellectually beneficial to the society. This principle is instantiated in the 1976 Act through section 102 (b), which states that "in no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[17]

The idea/expression doctrine is often said to have had its genesis in the 1879 U. S. Supreme Court decision in *Baker v. Selden*.[18] In that case, Selden had written a book describing a bookkeeping system he had invented; Selden's book also included blank forms that could be used in implementing the system. When Baker published similar forms, Selden claimed copyright infringement. The Supreme Court denied Selden's claim, pointing out that publishing a description of a particular art does not give an author the exclusive right to practice that art. "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book."[19] Without using the term "idea/expression dichotomy," the Court was clearly separating the conceptual content of Selden's method (the "art"), which was available to all, from its particular expression, which was copyrightable.

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[14] *Id.* at 362.

[15] *Id.* The Court also pointed out that Rural did not in fact "select" persons for inclusion in the white pages, but as the local carrier was required by state law to include all subscribers.

[16] Nimmer & Nimmer, Nimmer on Copyright @13.03[B][2][b] (2000).

[17] 17 U.S.C. @102 (b).

[18] 101 U.S. 99 (1879).

One key problem in the idea/expression doctrine is separating out ideas and expression. To make this determination, courts often turn to the words of famed federal appellate judge Learned Hand, who developed the so-called "abstractions" approach in a 1930 case involving a copyright infringement suit concerning two plays.[20] The essence of this approach is that as one moves away from the particular expression of a copyrighted work to a more abstract description of its content, at some point one leaves the protected domain and enters into the realm of unprotected ideas. As Hand put it: "Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended."[21] Hand himself recognized that this approach merely stated the problem without providing any clear means to its resolution and later in his career noted that "no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc."[22]

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[19] *Id.* at 103.

[20] Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930).

[21] *Id.* at 121.

[22] Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960).

Along with the notion that ideas are not protected, copyright law recognizes that in some cases an idea may "merge" with its expression in such a way that denying later users the right to borrow the expression would prevent them from using the idea as well.[23] This "merger doctrine" thus holds that where an idea can only be expressed in one way, or a very limited number of ways, the idea and expression have thereby merged and the expression cannot be protected by copyright.

III. Compilations Post-Feist

The Supreme Court has not revisited the compilation issue since *Feist*, and lower courts in the post-*Feist* era have at times had difficulty applying *Feist's* principles (along with related copyright doctrine, such as the idea/expression dichotomy) to concrete cases. This section will analyze several such cases and offer suggestions for an improved compilation jurisprudence.

One key issue that has arisen in the post-*Feist* environment is what, exactly, is a fact? The *Feist* Court's distinction between "creation" and "discovery" has not proven quite as self-defining as the Court might have hoped. This issue was at the heart of a 1999 decision by the U. S. Court of Appeals for the Ninth Circuit, *CDN, Inc. v. Kapes*.[24] In *Kapes*, the court considered whether coin dealer Kenneth Kapes had infringed the Coin Dealer Newsletter's (CDN) copyright in wholesale coin prices published by CDN. Kapes used CDN's wholesale prices, along with a computer program he developed, in order to generate a list of retail coin prices that Kapes posted on an Internet site. On cross-motions for summary judgment, a California district court ruled that CDN's wholesale prices were original creations rather than uncopyrightable facts and entered a judgment for CDN.

On appeal, the Ninth Circuit reviewed the issue of the copyrightability of CDN's prices *de novo* and affirmed the district court's finding for CDN. The Ninth Circuit noted that "the distinction between facts and non-facts, and between discovery and creation, lies at the heart of this case. The essential ingredient present in creations, but absent in facts, is originality, 'the sine qua non of copyright.'"[25] The court pointed out that Kapes' argument that the CDN price lists were comparable to the *Feist* phone number listings confused two very different issues. One issue was whether CDN's selection and arrangement of the prices was original enough to deserve copyright protection; the other was whether the prices themselves were simply facts or were in some sense original creations.

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[23] *See, e.g,* Herbert Rosenthal Jewelry Corp. v. kalpakian, 446 F.2d 738 (9th Cir. 1971).
[24] 197 F.3d 1256 (9th Cir. 1999).

As to the latter issue, the Ninth Circuit agreed with the lower court that the prices themselves were not facts, but rather the original product of CDN. CDN, the appellate court noted, began by examining coin publications for price data, using judgment to determine which information deserved attention. CDN also examined other data including public auctions and private sales, the state of the economy, prices posted by online dealers, and other information. As the Ninth Circuit put it, "CDN does not republish data from another source or apply a set formula or rule to generate prices. The prices CDN creates are compilations of data that represent its best estimate of the value of the coins."[26] The court noted that it was not the time and effort that CDN put into the process that justified the copyrightability of the prices. Rather, it was the at least minimally creative process CDN used in order to arrive at its best estimate of the market value of the coins. These values were not simply copied from the world of numismatics, but were created by CDN through its expertise and judgment.

The Ninth Circuit also explored the idea/expression doctrine, rejecting Kapes' argument that the prices were "ideas" of the value of the coins that had merged with their particular numeric expression. The court noted the generally acknowledged difficulty in distinguishing idea from expression, and stated it adherence to Judge Learned Hand's "abstractions" formula in making that distinction. The court also noted that the Ninth Circuit's guiding principle in applying the abstractions test was "the preservation of the balance between competition and protection reflected in the patent and copyright laws."[27] With little further analysis, the Ninth Circuit held that the prices were expressions rather than ideas: "CDN does not, nor could it, claim protection for its idea of creating a wholesale price guide, but it can use the copyright laws to protect its idea of what those prices are. . . . Drawing this line preserves the balance between competition and protection; it allows CDN's competitors to create their own price guides and thus furthers competition, but protects CDN's creation, thus giving it an incentive to create such a guide."[28]

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[25] *Id.* at 1259 (quoting Feist, 499 U.S. at 345).

[26] *Id.* at 1260.

[27] *Id.* at 1262 (citation omitted).

The U. S. Court of Appeals for the Second Circuit reached a similar conclusion, by slightly different reasoning, some years earlier in a 1994 case involving a used car price guide. *In CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.,*[29] CCC had used significant portions of Maclean Hunter's Automobile Red Book, which forecast values of used car models for the next six weeks in various regions of the country. Those values included adjustments for differences in mileage or option packages. As the Second Circuit described the Red Book's prices: "The valuation figures given in the Red Book are not historical market prices, quotations, or averages; nor are they derived by mathematical formulas from available statistics. They represent, rather, the Maclean editors' predictions, based on a wide variety of informational sources and their professional judgment, of expected values for 'average' vehicles for the upcoming six weeks in a broad region."[30]

The district court found no infringement by CCC, which had created various compilations based on the Red Book values, but the Second Circuit reversed. In an opinion written by renowned copyright expert Judge Pierre Leval, the Second Circuit found that the selection and arrangement of the Red Book -- which included dividing the used car market into various regions, selecting various options configurations for valuation, and adjusting mileages by 5,000 mile increments -- met the minimal standard of originality required by Feist.

The Second Circuit also found, as the Ninth Circuit would later do in *Kapes*, that the prices in the Red Book were not pre-existing facts, but original creations deserving of copyright protection. The price predictions were not reports of an historical truth or the algorithmic products of some mechanical formula, but "were based not only on a multitude of data sources, but also on professional judgment and expertise. The testimony of one of Maclean's deposition witnesses indicated that fifteen considerations were weighed . . . The valuations themselves are original creations of Maclean."[31]

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[28] *Id.*

[29] 44 F.3d 61 (2d Cir. 1994).

[30] *Id.* at 63.

[31] *Id.* at 67.

The court stated that it found the defendant's strongest argument to be based on the merger of idea and expression. That is, the individual prices were Maclean's "idea" of the used car's value, and that idea could only be expressed only one way, through the numerical values assigned. As a result, CCC argued, idea and expression merged and CCC's use of the expression was thus not infringing. As the court wrote, "This argument is not easily rebutted, for it does build on classically accepted copyright doctrine."[32]

Despite the Second Circuit's acknowledgement of the strength of the merger argument, the court nonetheless rejected it. The court noted that the Copyright Clause provided the fundamental rationale for copyright protection, which is advancing knowledge by providing a limited monopoly to authors. Despite that imperative, courts had developed in the idea/expression dichotomy a "new theory . . . that ideas are too important to the advancement of knowledge to permit them to be under private ownership . . . ."[33] This contradictory doctrinal landscape, the Second Circuit wrote, had created daunting interpretive difficulties in separating idea from expression. In compilation cases, "it is almost inevitable that the original contributions will consist of ideas," whether those ideas relate to selection of facts to include, or the coordination or arrangement of those facts.[34] To the Second Circuit, this recognition created an intolerable result: "If, as CCC argues, the doctrine of merger permits the wholesale copier of a compilation to take the individual expression of such ideas, so as to avoid the risk that an idea will improperly achieve protection, then the protection explicitly conferred by Section 103 of the U.S. Copyright Act will be illusory."[35]

To avoid this result, the Second Circuit relied on its own decision in the 1991 case of *Kregos v. Associated Press*.[36] In *Kregos*, the court had considered George Kregos's claim that the A.P.'s use of a predictive "pitching form" similar to Kregos's form had infringed his copyright. Kregos's form combined nine facts about each starting pitcher's past performance (such as won/lost record, earned run average, men on base average, etc.) that purported to assist one in predicting the outcome of a particular baseball game. It was undisputed that no previous form had used these precise nine items. In finding that A.P. had infringed Kregos's copyright by creating a virtually identical form, the *Kregos* court admitted that the identification of idea/expression merger was a conceptually difficult undertaking. However, the court found that Kregos's idea was not the particular nine statistics, but rather "that of an 'outcome predictive pitching form' in the general sense that it selects those facts that he thinks newspaper readers should consider in making their own predictions of outcomes. He does not purport to weight the nine statistics, much less provide a method for comparing the aggregate value of one pitcher's statstics against that of the opposing pitcher in order to predict an outcome or even its probability of occurring."[37] Even though the district court had found that the idea of an outcome-predictive pitching form merged with its expression by Kregos because of the limited number of ways it could be expressed, the Second Circuit disagreed, noting a large number of statistical combinations one might use to rate pitching performance. Merger thus had not occurred, the court found.

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[32] *Id.* at 68.

[33] *Id.* at 69.

[34] *Id.* at 70.

[35] *Id.*

[36] 937 F.2d 700 (2d Cir. 1991).

The appellate court contrasted its holding in *Kregos* with a hypothetical case of a doctor copyrighting a list of symptoms used to diagnose a disease. In that case, the court wrote, the "idea" in question may not be the abstract one of identifying a disease via particular symptoms, but "a more precise idea -- namely, the idea that his selection of symptoms is a useful identifier of the disease. That more limited idea can be expressed only by his selection of symptoms, and therefore might be said to have merged into his expression"[38] The court noted, however, what it viewed as a crucial distinction between the hypothetical doctor's symptom list and Kregos's pitching form. In the former case, the idea sought to assist in solving a particular problem, while the latter was a more subjective creation not aimed at solving problems that incorporated personal opinion and taste. As a result, the court wrote, the dangers of not applying the merger doctrine to the second category were greatly reduced. Kregos left the ultimate predictive judgment to his readers.

Applying the *Kregos* analysis, the court in *CCC* rejected application of the merger doctrine to the Red Book used car prices. The court suggested that the distinction between those ideas aimed at explaining phenomena and advancing knowledge and those based on the author's personal opinion allowed the use of the merger doctrine in the case of more important ideas and the withholding of its application to less useful information. As the court put it, "In cases of wholesale takings of compilations, a selective application of the merger doctrine, withholding its application as to soft ideas infused with taste and opinion, will carry out the statutory policy to protect innovative compilations without impairing the policy that requires public access to ideas of a more important and useful kind."[39]

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[37] *Id.* at 706.
[38] *Id.* at 707.

Two key issues emerge from the cases discussed above. The first concerns how post-*Feist* courts define "facts" that are not subject to copyright. The second issue is the sustainability of the separation of "soft" ideas from "hard" ideas proposed by several courts.

As to the first issue -- the definition of "facts" -- the holdings discussed above create serious concerns. In *Kapes*, the court found that the coin prices were not uncopyrightable facts, but original creations by virtue of the creativity CDN employed in determining those prices. Likewise, in CCC, the Red Book used car prices were found not to be facts. But why should the process by which the prices were derived be the determining factor in their eligibility for protection? Copyright protection is properly based on the originality of the expression produced by an author, not the specifics of the process of arriving at that expression. One way to describe this distinction is between inputs and outputs. The protection of copyright traditionally focuses on the output of an author, not the inputs that went into the expression. Even if those inputs are highly creative, when the resulting output or expression is a putative description of the world, such as the true value of a coin, it is difficult to see how one can realistically withhold the term "fact" from that expression. Even if the figure thus adduced is mistaken in some way -- perhaps the coin later sells for a higher or lower amount -- the author is putting forward the price as an accurate judgment of the coin's fair market value, whatever the process used to identify it. The Eleventh Circuit has followed this general approach in a 1997 *en banc* decision, *Warren Publishing, Inc. v. Microdos Data Corp.*[40] In *Warren*, the court rejected a district court decision that had entered a preliminary injunction based on the defendant's use of Warren's system of selection in a work categorizing and providing information on cable systems. In the case of multiple cable system operators, Warren designated one community as the "principal" community served by the system, based largely on the cable operators' stated preferences. The Eleventh Circuit noted that in gathering this data, Warren "relied in 'great part' on the questionnaire responses received from the various cable operators. These acts are nothing more than techniques for the discovery of facts. Simply because Warren may have been the first to discover and report a certain fact on cable systems does not translate these acts of discovery into acts of creation entitled to copyright protection."[41] Although the procedure itself might have been somewhat simpler than those employed in *Kapes* or CCC, the principle that can be extrapolated from *Warren* is a sound one: the process of discovering putative facts should not confer originality, and hence "non-fact" status, on the result.[42]

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[39] 44 F.3d at 72.

[40] 115 F.3d 1509 (11th Cir. 1997).

This is particularly true in light of the *Feist* Court's heavy emphasis on the notion that facts, however much effort goes into their formulation, have their genesis in some objective reality outside the author's control. As legal scholar Alan L. Durham put it, "the *Feist* Court almost certainly would not have recognized creativity in formulating facts -- whether characterized as judgment, experience or opinion -- as a source of copyrightable originality. Originality in formulating facts, like originality in gathering facts, is creativity that precedes expression, rather than being part of it. It may allow an author to convey a truer picture of the world, but that truth is not of the author's making, and cannot belong to the author by copyright."[43]

Put another way, when someone purports to offer an accurate description of some slice of reality, why should it matter for copyright purposes whether that description was produced by a mechanical process, the operation of expertise and judgment, divine revelation, or contact with ancestral spirits? When one claims to offer an accurate account of some aspect of the world, that is a putative "fact" for purposes of the statute. The suggestion, for example, that the valuation of an antique chair is a "fact" if it involves a simple averaging of past prices for similar items, but a "non-fact" if it involves "eyeballing" by an expert using some elaborate process combined with his or her judgment, creates a distinction nowhere to be found in *Feist* or in the text of the 1976 Act. This fact/non-fact distinction might be viewed as a back-door resurrection of the discredited "sweat of the brow" doctrine.[44]

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[41] *Id.* at 1520 (citations omitted).

[42] *See also*, BellSouth Advertising & Publishing Corp. v. Donnelley Information Publishing, Inc., 999 F.2d 1436 (11th Cir. 1993) (in yellow pages copying case, Eleventh Circuit stated: "Just as the Copyright Act does not protect 'industrious collection,' it affords no shelter to the resourceful, efficient, or creative collector." *Id.* at 1441.)

[43] Alan L. Durham, Speaking of the World: Fact, Opinion and the Originality Standard of Copyright, 33 Ariz. St, L.J. 791, 843 (2001).

The *Kapes* and CCC courts' distinction between "pre-existing facts" and creative predictions runs afoul of some important insights in contemporary philosophy, as several commentators have noted.[45] Following such thinkers as Stanley Fish, Michel Foucault, Richard Rorty, W. V. O. Quine, and others, contemporary thought has problematized the notion that human knowledge is "found" rather than "made."[46] To the extent that all truth-claims emerge from some conceptual framework, that all data are to some extent theory-impregnated, that there is no absolutely neutral observation language available to human beings, claims of some pre-existing substratum of facts to be contrasted with human interpretations seem epistemologically naive.

This is not to suggest that there are no better or worse accounts of the world; the point is not to advance a sophomoric relativism. As philosopher Kai Nielson has pointed out, despite the claims of some extreme relativists, "there is no doubt at all that fire burns, that water is wet, that snow is normally white, that cats are different than dogs, . . . that pain is bad, that pleasure is good, that there is some order in nature, and a host of other things. These truths are vague and in most circumstances their assertion is banal, but they are truths and we are more certain of them than we are of any theory which would deny them or try to provide a foundation for them."[47] There are indeed facts, but the world does not come pre-interpreted. The point here is simply that any line between "hard" and "soft" facts is an extremely slippery one, and that many, if not most, valuable pieces of information we colloquially call facts are in fact infused with some degree of judgment and subjectivity. Whether it is wise policy to allow such "soft" facts to be monopolized under the Copyright Act may is highly questionable, at least in part because it calls into question the entire edifice of the fact/expression dichotomy, which is both a critical statutory proxy for First Amendment free expression interests and an important balancing mechanism in bringing about the aims of the Copyright Clause.

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[44] Cf. PLI Advanced Seminar on Copyright Law 156 (2000).

[45] *See, e.g,,* Durham, *supra*, 33 Ariz. St. L.J. at 839-840; Jane C. Ginsburg, US Initiatives to Protect Works of Low Authorship, in Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society (Rochelle Dreyfus et al., eds., 2001).

[46] See generally, Steven Best & Douglas Kellner, Postmodern Theory (1991); Alexander Rosenberg, Philosophy of Social Science (1988). See also, Matthew D. Bunker, Critiquing Free Speech: First Amendment Theory and the Challenge of Interdisciplinarity 66-69 (2001).

[47] Kai Nielsen, Naturalism Without Foundations 319 (1996).

Professor Alan L. Durham has suggested a valuable alternative to the approach taken by the cases discussed above. Rather than distinguish "soft" and "hard" facts, the courts should, Durham suggests, draw the line between "reporting" and "taste."[48] Durham's idea is that the category of facts should encompass all attempts to describe the world, no matter how successful, while the realm of the aesthetic should be excluded from the "fact" category and thus be eligible for copyright protection. Although Durham acknowledges this scheme is not perfect, he notes that "in many cases the distinction can be resolved by looking at what the author purports to offer -- a personal reaction or a truth about the world."[49] This seems a promising direction, and the distinction could be perhaps be solidified, we suggest, by adopting a Supreme Court test from an unrelated area of legal doctrine -- defamation law. *In Milkovich v. Lorain Journal Co.,*[50] the Court separated factual assertions from opinion in libel law by asking whether the assertion in question was capable of being proved true or false. This standard, which is similar to what philosophers call "synthetic" statements, could sensibly be imported into copyright law to distinguish "facts" from "non-facts." The key issue is not whether a purported fact actually corresponds with the world, but whether its author offers it as an accurate reflection of reality – that is, whether it is capable of being proved true or false. If so, the statement should be treated as a "fact" for purposes of the fact/expression doctrine and should be available for use for the benefit of the public as part of the fundamental copyright bargain. This is true regardless of the method by which the "fact" is produced; in copyright law, the focus is on the expression, not the inputs that generate that expression. Facts, the building blocks of future knowledge, should be freely available for the public benefit, whether "hard" or "soft."

Just as the distinction between soft and hard facts is questionable, the distinction between hard and soft ideas advanced in the *Kapes* and *CCC* decisions is likewise problematic. As the previous discussion suggests, the epistemic status of hard versus soft ideas is unclear. In addition, the "soft" idea exception is without textual basis in the Copyright Act and is an exception that could conceivably swallow, if not significantly impair, the rule. The "thin" protection for original selection and arrangement advocated by the *Feist* court is sufficient to protect any interests of compilers that are legitimately protectible, while the ideas themselves, soft or hard, should be available to all, as the statutory scheme requires. A useful take on this issue comes from Judge Sweet's dissent in the *Kregos* case, which took issue with the majority's distinction between the "soft" pitching form and the "hard" doctor's symptom list. Judge Sweet maintained that "in both cases, the creators have conceived very precise 'ideas' concerning the significant data which ought to be considered in predicting a given result, and those ideas can be expressed only by identifying the relevant data. Of course, there is the obvious distinction that a system for making medical diagnoses is more socially beneficial than a system for estimating sports odds, but such a distinction does not offer a basis for denying copyright protection to one while granting it to the other."[51] By denying the hard/soft idea distinction, Judge Sweet recognized that all ideas are properly dedicated to the public domain by our copyright system.

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[48] Durham, *supra*, 33 Ariz. St. L.J. at 846.

[49] *Id.* at 847.

[50] 497 U.S. 1 (1990).

Finally, it should be noted that whatever the soundness of the doctrinal innovations discussed here, Congress has recently begun considering an alternative route to protect various compilations and databases. Congress has considered, but not yet passed, several bills designed to protect compilations outside of traditional copyright law.[52] These so-called *sui generis* regimes would protect unoriginal compilations from those who use some significant part of the compilation. Most proposals protect for a time period less than the current length of copyright protection. It is perhaps worth noting that some commentators have questioned whether the constitutional principles embodied in *Feist* would conflict with *sui generis* schemes.[53]

V. Conclusion

This paper has argued that the post-*Feist* decisions analyzed here propose problematic interpretations of the fact/expression and idea/expression doctrines. Those doctrines are important protections, not only for the copyright balance between incentive and public benefit, but for the free expression interests associated with the First Amendment. One could argue that a major justification of copyright protection is the need to generate facts and new ideas that can be used for the public benefit. To expand copyright protection across those boundaries thus imperils the very ends of copyright law. Compilers of information should be free to protect their original selection and arrangement, as *Feist* suggested, but should not be able to shield facts or ideas from their rightful place in the public domain.

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[51] 937 F.2d at 711 (Sweet, J., dissenting).

[52] *See, e.g.*, Collections of Information Antipiracy Act, H.R. 354, 106th Cong. (1999).

[53] Marshall Leaffer, Understanding Copyright Law 76 (3d ed. 1999).

Online Privacy : A Comparative Study of Privacy Practices on European and American Web Sites

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Abstract

This paper presents a background, comparison and discussion of the legal frameworks that have been adopted in the United States and in Europe regarding informational privacy in general and on line data protection in particular. The paper also contains a research component in which privacy policies of American and European Web sites are compared in order to answer the question whether or not different legal frameworks have given way to different on line privacy practices.

1. Data Protection as a Dimension of Privacy

The topic of this paper is online privacy, or online data protection. Data protection or informational privacy is but one dimension of privacy, but one that has gained importance in recent times with the rise and development of the Internet and its seemingly limitless ability to gather and collect information about people, preferences and surfing behavior. Data protection is not an issue limited to the online world, but the development of the Internet seems to have highlighted the issue. So while the title of this paper is online privacy, the reader should bear in mind that data protection is only one dimension of the privacy issue and that data protection is an issue that not only refers to the online environment.

Data protection is considered to be an aspect of privacy protection. One could argue that the issue of data protection should be separated from the privacy issue altogether since having one's data not sold without one's consent is something altogether different than say, having one's picture taken without knowledge or consent and finding it on the web, or having some secrets from one's past or personal life revealed in public. Including data protection in to the mix of "privacy issues" might make matters confusing, because privacy then seems to cover a very broad range of issues. This paper however, follows the mainstream contention that data protection is an intrinsic aspect of privacy, but that it has to be distinguished from other issues concerning privacy.

Different authors have given different definitions to privacy, and it is well beyond the scope of this paper to give an extensive overview of all of them. Westin defined privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others,"[1] a definition that fits well in the context of information privacy. Informational privacy or data protection, involving the rules on processing and gathering personal data, then, needs to be distinguished from other forms of privacy such as bodily privacy,[2] privacy of communications[3] or territorial privacy.[4] [5] While it is important to distinguish informational privacy from these other types of privacy in our discussion, it is also important to keep in mind that all these privacy issues are similar to some extent; they all deal with the tension between openness and the claims of individuals to keep certain information and/or areas of their lives closed off for certain people, companies or groups .

2. Privacy development in the United States

In the United States, the introduction of privacy on the legal stage is generally attributed to Warren and Brandeis. Even though privacy, in terms of intrusion, was not totally alien to the American courts before then,[6] their *Harvard Law Review* article "The

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[1] Alan Westin, *Privacy and Freedom*, (New York: Atheneum, 1967), 7.
[2] Protection against bodily searches and invasive procedures such as genetic testing.
[3] Concerns the confidentiality of communications.
[4] Concerns limits on intrusion in physical places.
[5] *See*: David Banisar, "Privacy and Human Rights, An International Survey of Privacy Laws and Developments," *Privacy International*, 2000.
[6] For an overview *see* Robert Ellis Smith, *Ben Franklin's Web site : Privacy and Curiosity from Plymouth Rock to the Internet*, (Providence, Rhode Island : Privacy Journal Publishers, 2000).

Right to Privacy"[7] is believed be the basis for the privacy conception as it is understood today by American jurists.[8] Although the direct impetus for their article was intrusive journalism, the deeper and more general concern of Warren and Brandeis was that new technologies (photography) threatened individuals' privacy. Brandeis and Warren argued that a common law protection for the 'right to be let alone' should be developed, in the form of a property right in personal information, similar to defamation.[9] That right, they argued, was warranted in the light of the growing privacy threats of new technology. At the eve of the twentieth century, Warren and Brandeis showed a concern and fear for the implication of modern technology and its implications for privacy, a concern that still lies at the core of most of the privacy debates today.

Years later, as an associate justice, Brandeis would reiterate his concern in his dissenting opinion in *US v. Olmstead,*[10] a wiretapping case: "Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home."[11] Some have argued that Brandeis had not yet really thought through the implications for the First Amendment of his statements at that time,[12] while others contend that had Brandeis "imagined the Internet, he most likely would have predicted, and urged, further development of privacy law."[13]

New technological developments have always instilled some degree of fear. It is undeniable that the evolution in computer technology after WWII that enabled government (and later private companies) to stockpile huge amounts of data on individuals has foreshadowed the growing privacy concerns over the last couple of decades.[14] In the sixties, scholars such as Packard,[15] Westin,[16] Rosenberg,[17] and Brenton[18] were pointing out the privacy dangers raised by new technologies.[19]

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[7] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 *Harv. L. Rev.* 193 (1890).
[8] Brin, 70.
[9] Warren and Brandies, 195.
[10] 277 U.S. 438 (1928).
[11] *Ibidem,* 474.
[12] Soveig Singleton, "Privacy Versus the First Amendment: A Skeptical Approach," 11 *Fordham I. P. Media & Ent. L.J.* 97 (2000), 105-106.
[13] Dorothy Glancy, "Symposium on internet Privacy : At the Intersection of Visible and Invisible Worlds: United States Privacy Law and the Internet," *16 Computer & High Tech. L.J.* 357 (2000), 381.

The seventies were also an active period for information privacy. President Nixon expressed a great concern for privacy issues, in a language similar to those of privacy advocates today: "What a person earns, what he owes, what he gives to his church or to his charity is his own personal business and should not be spread around without his consent. When personal information is given or obtained for one purpose,..., it should not be used by anyone for any other purpose."[20] In 1970, a commission was formed by Elliott Richardson, then secretary of Health, Education and Welfare (HEW), to study the impact of computers on privacy. The final report, issued in 1973, articulated a code for fair information practices.[21] This document is one of the first ones in its kind worldwide and has been referred to as "the computer age's most significant policy development with respect to privacy"[22] and "the most significant American thinking on the topic of computers and privacy to this day."[23] The code is based on five principles;

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[14] The impetus for this growing concern was provided by the Bureau of Budget when it developed plans for a National Data Center, in the second half of the 1960's. The National Data Center would have centralized the data of four government agencies, and contain electronic records on every US citizen. The idea was to cut costs by combining data in one location., it caused a shockwave of protests from privacy advocates. *See:* Rule et al., *The Politics of Privacy*, (New York : New American Library, 1980), 55-57.

[15] Vance Packard, *The Naked Society*, (New York : D. McKay Co, 1964).

[16] Alan Westin, *Privacy and Freedom*, (New York : Atheneum, 1967).

[17] Jerry Rosenberg, *The Death of Privacy*, (New York : Random House, 1969).

[18] Myron Brenton, *The Privacy Invaders*, (New York : Coward-McCann, 1964).

[19] It is important to note that it was the reshuffling and reorganizing of information that raised the concerns, perhaps more than the compiling of the information as such. The question of whether or not a certain change or innovation in the way data are processed or stored creates a situation that is so different in kind that it poses privacy threats that were inconceivable before (and consequently calls for a new legal framework) lies at the core of many privacy debates. Some, such as Singleton, have argued that there is nothing inherently "new" about these new technologies that would justify extra protections (*See* Solveig Singleton, "Privacy Versus the First Amendment: A Skeptical Approach," 11 *Fordham Intellectual Property, Media & Entertainment Law Journal* 97, (2000), 134-140.) while others such as the American Civil Liberties Union have argued the opposite (*See* "Defend Your Data" <http://www.aclu.org/privacy/background.html>.)

[20] Rule et al., 69.

- There must be no data record keeping systems whose very existence is secret.
- There must be a way for a person to find out what information about the person is in a record and how it is used.
- There must be a way for a person to prevent information about the person that was obtained for one purpose from being used or made available for other purposes without the person's consent.
- There must be a way for a person to correct or amend a record of identifiable information about the person.
- Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take precautions to prevent misuses of the data.[24]

However, the privacy awareness of the 1970s did not lead to a lot of privacy legislation, especially the private sector has remained largely unregulated. During the Reagan and Bush administrations privacy concerns were put on the back burner.[25]

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[21] U.S. Dep't of Health, Educ. & Welfare, Secretary's Advisory Comm. On Automated Personal Data Systems, Records, Computers and the Rights of Citizens (1973).

[22] Robert Gellman, " Does Privacy Law Work?" in *Technology and Privacy: The New Landscape,* Philip Agre and Marc Rotenberg, eds., 193-217 (Cambridge, Mass. : MIT Press, 1997), 196.

[23] Simon Garfinkel, *Database Nation : the Death of Privacy in the 21st Century,* (Beijing ; Cambridge : O'Reilly, 2000), 7.

[24] Reprinted in Garfinkel, 7.

[25] Seth Safier, "Between Big Brother and the Bottom Line: Privacy in Cyberspace," 5 *Va. J.L. & Tech.* 6 (2000), § 16.

Towards the end of the century however, the rise of computer technology in general and the Internet in particular made it easier for businesses to collect and process personal information and the privacy debate has come to focus more on the private sector's use of transactional data. In numerous polls, the public has expressed its concern about online data mining tactics and stated that it wants privacy better regulated on the Internet.[26] In Washington the privacy climate has changed. Numerous privacy bills have been introduced:[27] the Federal Trade Commission has asked for privacy legislation,[28] and even George W. Bush, while he was still a candidate stated that he wants privacy to be better protected on the Internet.[29] This changing general climate and the rising privacy concerns among public and scholars have not yet been translated into all encompassing privacy legislation and the legal framework does not enable consumers to enforce the fair information practices set forward by the HEW. When privacy legislation was introduced, it has generally been to correct a specific situation. A mixture of tort law, federal and state statutes, and case law protects individuals' informational privacy to some extent, but by and large the American information privacy regime is relatively weak.

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[26] For an overview of these polls, *see* <http://www.epic.org/privacy/survey/default.html>.

[27] For an overview of the major Internet privacy bills of the 106th congress, *see* Center for Democracy and Technology : "Legislation Affecting the Internet."
<http://www.cdt.org/legislation/106th/privacy/majorbills.shtml>
For month to month updates about bills of the 107th congress, *see* Epic alert newsletter:
<http://www.epic.org/alert/alert_vol_8.html>

[28] "FTC Recommends Congressional Action to Protect Consumer Privacy Online," FTC Press Release, May 22, 2000.
<http://www.ftc.gov/opa/2000/05/privacy2k.htm>

[29] Lisa Bowman, "George Bush Talks Tech with ZDNet," *ZDNet News*, June 20, 2000.
<http://www.zdnet.com/zdnn/stories/news/0,4586,2591261,00.html>

3. Privacy legislation in the United States

3.1. Constitutional Protection.

The constitution does not provide an informational privacy protection. The rights guaranteed in the constitution are protected only against government action (except for the Thirteenth Amendment, which prohibits slavery). The language of the Constitution is also negative: it does not oblige the government to do anything, but rather, to refrain from doing certain things, in order to protect the fundamental rights of its citizens. "These two features reflect a historical dichotomy between the government and the citizenry and a longstanding commitment to limited governmental power."[30] As a result, the governmental power to actively protect a right, such as privacy, is limited. A right to privacy is not mentioned in the Constitution even though Supreme Court Justice Douglas has described the right to privacy as lying within the "penumbra" of the bill of rights.[31] The right to privacy derived from this penumbra would emanate from the First, Third, Fourth, Fourth, Fifth, Ninth and Fourteenth Amendments.[32] In the context of data protection, however, this penumbra theory is not very relevant, it is brought up in the context of cases involving reproductive or sexual functions,[33] (bodily privacy).

3.2. Statutes.

a. public sector.

There are some public sector statutes that regulate data handling. These statutes are some of most comprehensive pieces of American legislation that regulate the processing of personal information, but they apply only to the public sector. The best example of the Privacy Act of 1974,[34] a federal statute that regulates the public sector's use of personal data, incorporating the principles set out by the HEW commission. Another examples is the Driver's Privacy Protection Act (DPPA),[35] which requires that drivers be given an opportunity in "a clear and conspicuous manner" to prohibit disclosure of their information (photograph, social security number, driver identification number, name, address, telephone number, and medical or disability information) to third parties.[36] Other examples of federal statutes are the Family Educational Rights and Privacy Act of 1974[37] (requiring federally funded schools and universities to protect student data) and the Right to Financial Privacy Act of 1978[38] (requiring federal investigators to notify some one when they have requested access to his banking or credit card records). Statutes like these are tailored very narrowly, and are more directed at eliminating certain abuses than at protecting informational privacy as a fundamental right.

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[30] Fred Cate, *Privacy in the Information Age*, (Washington, D.C. : Brookings Institution Press, 1997), 52.
[31] *Griswold v. Connecticut*, 381, U.S. 479 (1965), 484-485
[32] *Idem.*
[33] Singleton, "Privacy versus the First Amendment,"104.

b. private sector

Political tradition in the United States has made regulation of the private sector hard to sell. When it comes to regulating private business and affairs, the role of the government is limited, for a large part, to that of a passive observer. However, there is some regulation of the private sector, by means of statutes aimed at correcting particular perceived evils in very specific and limited areas. Examples include The Video Privacy

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[34] 5 U.S.C. 552a (1994).
[35] 18 USCS § 2721 (2001).
[36] *See* Pub. L. No. 106-69, § 350, 113 Stat. 1025 (1999).
[37] 20 U.S.C. 1232g (2000).
[38] 12 U.S.C. 3402 (1994).

Protection Act,[39] The Electronic Communications Privacy Act,[40] the Children's Online Privacy Protection Act of 1998 (COPPA)[41] the Right to Financial Privacy Act,[42] the Cable Communication Policy Act, [43]the Telephone Consumer Protection Act.[44] Apart from these federal statutes, legislative privacy protection exists at the state level, adding to the "patchwork quilt" privacy protection in the United States has become. Privacy statutes differ significantly across states; some being more "adequate" than others. But overall, "privacy protection under state law remains piecemeal and inadequate in the face of the challenges by the technological explosion."[45] The statutory protection certainly might have helped in preventing or correcting certain undesirable situations, but it also has closed off some previously available information and has restricted data flows. Neither privacy advocates nor critics can be satisfied with the current situation. Privacy advocates could not fail to notice the rather limited area in which there currently exists privacy legislation, privacy critics might be concerned that even these rather limited and narrowly tailored statutes might restrict speech and the free flow of information.[46]

3.3. Torts

In their famous article, Warren and Brandeis pleaded for the extension of the common law so that non-governmental privacy intrusions would also be covered by privacy law. Seventy years passed before Prosser, after analyzing various court opinions, categorized the right to privacy in to four torts. [47]

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[39] 18 U.S.C. § 2710 (1994).

[40] codified as amended in scattered sections of 18 U.S.C.

[41] 18 U.S.C. §§ 2510-2520, 2701-2709 (1999).

[42] 12 U.S.C. § 3401 (1999).

[43] 47 U.S.C. 551 (1994).

[44] 47 U.S.C. 227 (1994).

[45] Safier, §92.

[46] Gellman, 210-211.

[47] William Prosser, "Privacy," 48 *Cal. L. Rev.* 383 (1960).

1. Unreasonable intrusion upon the seclusion of another.
2. Appropriation of another's name or likeness.
3. Unreasonable publicity given to another's private life.
4. Publicity that unreasonably places another in a false light before the public.[48]

Most of the states in the US have adopted at least some of these torts, but it is doubtful if these torts can do much to implement data protection principles. The privacy torts simply do not seem to cover issues of informational privacy. Courts have generally set a high negligence standard to govern what a party may and may not do with information, and considerable harm must be sustained in order to find redress under tort law.[49] Also, the expectation of privacy must be reasonable, and, as Gellman argues, with the widespread use of computers to collect and transfer data, it might no longer be reasonable to expect your data to be private. Some scholars maintain that the privacy torts possibly could be expanded to also cover informational privacy;[50] others are less convinced.[51] Up until now, courts have always maintained that selling subscriptions lists without permission does not constitute an invasion of privacy under the appropriation tort.[52]

3.4. Conclusion.

The American legal framework is not especially conducive to data privacy protection. Internet companies have been sued because they did not comply with their own privacy policies, but compared to the European legal framework (see below), the

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[48] *Ibidem*, 389.

[49] Safier, §108.

[50] Anne Hawley, "Taking Spam out of your Cyberspace Diet: Common Law Applied to Bulk Unsolicited Advertising via Electronic Mail," 66 *UMKCA. L. Rev.* 381 (1997), 382-95; Sandra Petersen, "Your Life as an Open Book; Has Technology Rendered Personal Privacy Virtually Obsolete?" 48 *Fed Comm L.J.* 163 (1995), 183-184.

[51] Joel Reidenberg, "Setting Standards for Fair Information Practice in the U.S. Private Sector," 80 *Iowa L. Rev.* 497 (1995), 505; Oscar H Gandy, "Legitimate Business Interest: No End in Sight," 1996 *U.Chi. Legal F* 77 (1996), 126.

American system is both piecemeal and ad hoc. The guiding principle has been not to intervene in the private sector. The Clinton-Gore administration adopted a self regulation approach to the issue of online privacy.[53] This liberal approach has been aimed to correct only the most egregious situations, and to regulate in reaction to a particular problem rather than to pass all encompassing laws. Recognition of privacy as a fundamental human or constitutional right is not very strong, especially when interfering with other fundamental values, such as the free flow of information. Therefore, privacy legislation of the public sector has also been relatively limited. Another important feature of American privacy legislation is that there are no agencies that are responsible for enforcing the different privacy acts, which makes them toothless.[54] Fred Cate explains perfectly the American approach to privacy protection of personal information:

> The U.S. approach to information privacy inevitably results in some harm to individuals' privacy, reputations, and sensibilities. But it reflects a constitutional calculation that such harm is less threatening to the body politic than the harm associated with centralized privacy protection, government interference with the information flows necessary to sustain democracies and markets, and the growing ineffectiveness of omnibus legal controls in the face of the widespread proliferation of powerful information technologies. We should be loathe to alter that delicate constitutional balance lightly, by granting to the government new authority to interfere with the flow of information in the search for new-but often illusory and costly-protection for personal privacy.[55]

3.5. Recent Developments.

However, there is movement on the privacy front, with some important bills waiting in both Houses. One of these bills would establish a federal privacy commission,[56] which would study information practices across the nation and report back

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[52] *See* for example *Shibley v. Time*, 341 N.E. 2d 337 (1975).

[53] *See*, William Clinton, "Presidential Directive, Memorandum for the Heads of Executive Departments and Agencies," July 1, 1997. <http://www.whitehouse.gov/WH/New/Commerce/directive.html>

[54] Gellman, 213; Boucahard, 53.

[55] Cate, "Principles of Internet Privacy," 894.

[56] H.R.583 Privacy Commission Act.

to Congress and the president, formulating proposals how to better protect consumers' privacy in the Information age. This commission would not, at least in this version of the bill, enforce the law. It would merely be studying the existing law to try to get to a "coherent privacy policy" rather than "a patchwork of conflicting laws."[57] The bill has been criticized because it would be an attempt to delay or obstruct current proposed privacy legislation and because it merely creates an "illusion of progress on privacy."[58] Other Examples of proposed legislation in the Senate and Congress are the Consumer Online Privacy and Disclosure Act[59] the Privacy Act of 2001[60] and Electronic Privacy Protection Act.[61] The most promising (providing the strongest privacy protection) of the proposed pieces of legislation is the Online Personal Privacy Act, which was approved by the Senate Commerce Committee on May 16, 2002.[62] The bill is much stronger than the industry-friendly Consumer Online Privacy and Disclosure Act which was introduced in the House. However, the bill is still far from being signed in to law and, as with so many privacy bills that have been proposed the last couple of years, it remains to be seen if this will actually happen.

Meanwhile other parts of the world have grappled with the same issues, but have taken a totally different route in dealing with them. When we are dealing with a global medium such as the Internet, different approaches are bound to collide and impact each

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<http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h583ih.txt>

[57] Rep. Steve Horn, R-Calif, cited in "House panel votes to create new privacy commission," *Govexec.com*, May 10, 2001.
<http://www.govexec.com/dailyfed/0501/051001njns.htm>

[58] Rep. Janice Schakowsky, D-Ill cited, in *Ibidem.*

[59] H.R. 347 : "To require the Federal Trade Commission to prescribe regulations to protect the privacy of personal information collected from and about individuals on the Internet, to provide greater individual control over the collection and use of that information, and for other purposes."

[60] S. 1055 : "A bill to require the consent of an individual prior to the sale and marketing of such individual's personally identifiable information, and for other purposes."

other. This has certainly been the case for the European data protection legislation, which has indirectly become a legal framework that imposed itself on many American businesses.

4. Privacy Legislation in the European Union

The European approach to privacy legislation is grounded in the conviction that privacy is a human right

> Contrary to most other documents and nearly for the first time in the history of the Community, the Commission in its draft said that the need for the Directive is based on the need to protect human rights within the Community. This is why, when we speak of data protection within the European Union, we speak of the necessity to respect the fundamental rights of the citizens.[63]

The right to privacy is established in article 8[64] of the European Convention on Human Rights,[65] a document all member states have to abide by. A number of scholars consider the recognition of privacy as a human right in the EU to be the quintessential difference between European and American privacy legislation.[66] However, upon closer reading, there is not a big difference between article 8 of the ECHR and the Fourth Amendment to the American constitution. Article 8 refers to only protection of private matters from

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[61] H.R. 1012 : "To prohibit the making, importation, exportation, distribution, sale, offer for sale, installation, or use of an information collection device without proper labeling or notice and consent."
[62] S. 2201.
[63] Fred Cate, "The EU Data Protection Directive, Information Privacy and the Public Interest," 80 *Iowa L. Rev.* 431 (1995), 439.

[64] 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[65] Council of Europe, Rome, November 4, 1950.
<http://www.hri.org/docs/ECHR50.html>
[66] Fromholz, "The European Union Data Protection Directive," 466; James Sunosky, "Privacy Online: A Primer on the European Union's Directive and United States' Safe Harbor Privacy Principles," 9 *Currents Int'l Trade L.J.* 80 (2000), 82.

government intrusion, just as the Fourth Amendment does, but it says nothing about protection from private actors. However, in the European legal framework this Human Right has been expanded to the private sector as well. In the context of the EU Directive –the legal framework adopted by the EU to address data protection (see below)- this happened in 1990 when the European parliament amended the draft of the Directive to encompass both public and private sector data protection.[67]

Contrary to the American liberal approach, where market mechanisms are expected to kick in if informational privacy really becomes an issue for the public,[68] the European approach is based upon the notion that the state needs to protect the citizens, and has to "frame the social community in which individuals develop,"[69] meaning that the state has to play an active role in shaping and regulating the private sector. The combination of the standing of privacy as a human right, the hands on approach of the nation state and the skepticism towards big business has led to a particular approach to data protection, one that is totally different from the one in the United States.

The first European governments to adopt data protection legislation were the German state of Hessen (1970) and Sweden (1978), however, most European countries lagged behind and did not have similar legislation in place at that time. Just as in the United States, concerns about the increasing possibilities of computer networks to store information spurred data protection legislation.[70] At the time, data protection in Europe was sparse, vague and different among various member countries. In the context of the European Union this was particularly worrisome because with different levels of data protection, the possibility existed that some countries with a high standard for data protection would cut off data transfers to countries with a lower standard. This would have had negative consequences for the free flow of goods and services within the EU. Therefore, an international regulatory framework for the processing and transfer of data, became a necessity.[71]

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[67] Cate, *Privacy in the Information Age*, 36.
[68] Reidenberg, "Resolving Conflicting International Rules in Cyberspace," 1346.
[69] *Ibidem*, 1349.

In 1980, the Organization for Economic Cooperation and Development (OECD), an organization to which, in addition to the EU countries, the United States, Australia and Japan also belong, crafted a set of guidelines concerning data protection.[72] The member countries were encouraged to enforce the guidelines into national law. The principles of these guidelines were based on the American Fair Information Principles crafted by the HEW six years earlier. The OECD guidelines provided the principles upon which future European legislation would be based. The guidelines are built around a number of core principles: collection and limitation,[73] data quality,[74] use limitation,[75] security,[76] openness,[77] individual participation,[78] accountability.[79] [80] Though the OECD guidelines were not binding, they had a significant impact in Europe. The Council of Europe

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[70] James Assey and Demetrios Eleftheriou, "The EU-U.S. Privacy Safe Harbor: Smooth Sailing or Troubled Waters?" 9 *Comm Law Conspectus* 145 (2001), 149.

[71] Walrave, 218-220.

[72] "Recommendation of the Council Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data," Organisation for Economic Co-operation and Development (OECD), September 23, 1980.
<http://www.oecd.org/dsti/sti/it/secur/prod/PRIV-EN.HTM>

[73] Data can only be collected legally, and not without the data subject's knowledge or consent.

[74] Data collectors should only collect data relevant to their purpose, and data should be kept up to date, complete and accurate

[75] Data should not be disclosed to outsiders without renewed consent by the data subject.

[76] Data must be kept safely, and protected against loss, destruction, unauthorized use, modification or disclosure.

[77] Data subjects should at all times be able to determine the whereabouts, use, and purpose of personal data relating to them

[78] Data subjects have the right to inspect any data concerning themselves and the right to challenge the accuracy of such data and have them rectified or erased by the collector.

[79] : The collector is accountable to the data subject in complying with the above principles.

[80] OECD guidelines, 7-14.

recommended its member states to implement data protection consistent with the OECD guidelines.[81]

However, this did not effectively happen, but the EU was still serious about adapting a common level of privacy protection. As long as there was no common level of protection, the unification process would be hindered. After numerous debates and countless revisions "Directive 95/46/EG on the protection of individuals with regard to the processing of personal data and on the free movement of such data," (hereafter referred to as the "Directive") was passed in the European parliament on October 24, 1995. The principles in this draft reflected the OECD and HEW guidelines.

5. European Data Directive.

The Directive is very general and sweeping in what it covers: both the public and private sector are covered, and it applies to manual as well as to automated filing systems.[82] The Directive requires EU member states to ensure that personal data[83] are:

- "processed fairly and lawfully."[84] Fairly here refers to transparence, the data subject must be informed about the use that will be made of his data.[85]
- "collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes…"[86]

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[81] "Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data," Council of Europe, January 28, 1981. Europ. T.S. No. 108. <http://www.privacy.org/pi/intl_orgs/coe/dp_convention_108.txt>

[82] article 3, (1).

[83] Defined as "any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity."

[84] article 6, (a).

[85] Walrave, 225.

[86] article 6, (b).

- "adequate, relevant and not excessive in relation to the purposes for which they are collected and/or processed."[87] Controllers of data are required to take any reasonable step to ensure the rectification or erasure of inaccurate data.
- "kept in a form which permits identification of individuals for no longer than is necessary."[88]All irrelevant data (for the purposes they were collected for) must be erased. Inaccurate data need to be corrected or erased. Data can also not be kept longer than necessary to fulfill the purpose they were initially collected for.

The Directive also states that data cannot be processed without the unambiguous consent[89] of the data subject, except for some limited uses.[90] The data subject should be well informed before giving his consent, and the processing can go no further than where the data subject has given his permission for (use limitation principle). The Directive also establishes three important rights of the data subject: the right of information, the right of access and the right to object. Article 10 states that subjects must know the identity of the controller,[91] the purpose of the processing,[92]and some other information such as the consequences of not given the information, the recipients of the data and the existence of a right to access.[93] This right to access is further established in article 12, which states that member states must guarantee that the data subject can access and be given information about what data about him are stored and how they are stored.[94] The data subject can also demand the rectification, blocking or erasure of data not processed in accordance with the directive.[95] The right to object is already contained in the consent requirement of article 7, but article 14 also provides the data subject with a specific right to object in the context of direct marketing,

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[87] article 6, (c) .
[88] article 6, (d).
[89] article 7, (a).
[90] "for the performance of a contract" (art. 7(b)) (but the processing can go no further than necessary for the performance of a contract), for "compliance with a legal obligation," (art. 7(c)) or "in order to protect the vital interests of the data subject," (art. 7(d)) for "the performance of a task carried out in the public interest or in the exercise of official authority,"(art.7(e)) or for "the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject."(art.7(f)).
[91] article 10, (a).
[92] article 10, (b).

> on request and free of charge, to the processing of personal data relating to him which the controller anticipates being processed for the purposes of direct marketing, or to be informed before personal data are disclosed for the first time to third parties or used on their behalf for the purposes of direct marketing, and to be expressly offered the right to object free of charge to such disclosures or uses.[96]

Article 28 requires that member states designate authorities responsible for the monitoring of compliance with the law. These authorities must be endowed with powers to investigate, intervene, engage in legal action and have the power to hear claims lodged by any person regarding lawfulness of certain data processing. Data collectors have to register with those bodies, when they intend to process data. The philosophy behind this is that data subjects should have a public agency on their side. Since data protection is so complex and happens away from the public eye, it is assumed that it would be too much to ask of individuals to stand up for their privacy rights against corporations and their sophisticated data mining tactics.[97] Representatives of these supervisory authorities[98] of the different member states make up the so called Working Party. The Working Party is an advisory organ on the European level. It examines the way the Directive is

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[93] article 10, (c).
[94] article 12, (a).
[95] article 12, (b).
[96] article 14, (b).
[97] Peter Swire and Robert Litan, *World Data Flows, Electronic Commerce, and the European Privacy Directive*, (Washington, D.C. : Brookings Institution Press, 1998), 38.

implemented in the different member states, and gives advises and opinions on the interpretations and executions of the Directive. Typically, the Working Party has a very strict and rigorous vision on data protection, since it is composed out of data protection commissioners who all share a very great concern for privacy. It has been pointed out that this poses the danger that the members of the Working Party might have a disproportional great concern for informational privacy compared to other policy goals, such as trade relations with other countries.[99] The findings of the Working Party are forwarded to the so-called article 31 Committee, which is composed of representatives of the member states.[100] This committee, together with the European Council of Ministers has the power to make decisions based on the advise of the Working Party before it goes to the European Parliament.

One of the most crucial articles in the Directive is article 25, on the transfer of personal data to third countries. Privacy legislation can only work when it is 100% waterproof. The drafters of the Directive wanted to prevent that loopholes would be made by the creation of off shore "data heavens." Article 25 states that data transfers to a "third country" can only take place if that country can guarantee an "adequate level of protection." If the European Commission feels that a certain country does not guarantee sufficient protection, member states have to prohibit transfer of data to that country. The Directive was supposed to take effect October 25, 1998, but as of yet (winter 2001) some countries have not yet completed the whole ratification process of implementing the Directive in national law.

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[98] For an overview and online access to the websites of the privacy commissions of the 15 EU Member States, *See* <http://europa.eu.int/comm/internal_market/en/dataprot/links.htm>
[99] Swire and Litan, 41.
[100] Article 31, (1).

6. Safe Harbor Agreements

The whole philosophy behind the EU Directive is a radical departure from the approach chosen in the United States. Whereas in the United States, data protection is piecemeal and fragmented, targeting mainly the public sector, with very few overseeing privacy agencies, the European approach is much more hands on and aggressive. Because the Europeans consider privacy to be a human right, data protection is taken very seriously. In the United States, the distrust of government and the standing of the First Amendment make a similar framework improbable, even though several pieces of legislation are being proposed that are more "European" in nature (The Online Personal Privacy Act especially is very similar to the European approach to data protection.)

These two approaches have clashed over the past couple of years. The United States is one of the countries where the level of protection is not considered to be sufficient by the Working Party and the Commission. This could have resulted in a data embargo against the United States, which would have had far reaching consequences for companies who rely on the transborder flow of data for their day to day operations: airlines, banks, hotel chains or rental companies with international reservation systems, insurance companies, and many other branches of the economy.[101] Between 1998 and Fall 2000, the European Union and the United States representatives have been debating how American companies could avoid this data embargo by complying with some data collection principles.

In the spring of 2000, after more than two years of negotiating, the European Commission finally approved a set of principles proposed by the US Department of

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[101] David Aaron, " Privacy Across the Pond; U.S. Companies Soon Will Have a Safe Harbor Through Which to Navigate the Daunting Restrictions," *The Star Tribune*, Sunday, June 4, 2000, A-2. .

Commerce that American companies, wanting to transfer personal data across the Atlantic could choose to adhere to.[102] Organizations that want to invoke the Safe Harbor must follow the principles of notice, choice, onward transfer, data security, access and enforcement. In this scheme, organizations voluntarily sign up for the Safe Harbor, and a list of all organizations that have joined is held by the Department of Commerce. Enforcement will be exercised by alternative dispute resolution mechanisms such as TRUSTe or BBBonline. If "harborites" fail to comply with the rulings of these bodies, the FTC will be notified. The commission can then take further steps against them under section 5 of the Federal Trade Commission Act. This act declares "unfair or deceptive acts or practices in or affecting commerce" to be illegal.[103] Officially the Safe Harbor agreement went in to effect on July 1, 2001. The Safe Harbor has not been a huge success, at least when looking at the number of sign ups. As of March 2002, only 176 companies had signed on to the list.[104]

There are also some concerns about the legality of the Safe Harbor scheme. The FTC, in its communication with the EU, assumed the role of protector of data privacy in the United States, and as the agency that would go after Web sites that do not comply with the principles they subscribed to.[105] However, there are some statutory limitations on the FTC's jurisdiction in this matter. The FTC's enabling act states that the agency can only intervene where an unfair practice or act "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[106]

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[102] "Safe Harbor Privacy Principles," U.S. Department of Commerce, July, 21, 2000. <http://www.export.gov/safeharbor/SHPRINCIPLESFINAL.htm>

[103] *See* Jordan Blanke, "Safe Harbor and the European Union's Directive on Data Protection," 11 *Alb. L.J. Sci. & Tech.* 57 (2000) for a more in depth discussion of the Safe Harbor agreement.

[104] For the list of companies that have signed up : *See* <http://web.ita.doc.gov/safeharbor/shlist.nsf/webPages/safe+harbor+list>

[105] Robert Pitofsky, "Federal Trade Commission Letter to EU Commission on its Jurisdiction over Consumer Privacy Issues," July 14, 2000. <http://www.useu.be/ISSUES/ftc0714.html>

Whether or not the Safe Harbor will prove to be successful remains to be seen, but some observers have pointed out that, in their dialogue with the EU, the United States has both overstated the proactive role of the FTC as well as the extent to which American common law provides privacy protection (claiming that tort law applies to data protection, while, as discussed above, this applicability is purely theoretical and has not been established by the courts). [107] The Safe Harbor agreements are a solution whose workings are still vague, its legality questionable, some are even going as far as calling the Safe Harbor provisions nonsense.[108] Yet, the European legal framework and the Safe Harbor agreement might have a de facto impact on data protection in the United States. Privacy advocates were quick to point out that the FTC would treat American citizens as second class citizens by enforcing the Safe Harbor principles for American companies dealing with data on EU citizens, while applying different standards for data on Americans. [109] Another effect of the Safe Harbor Principles/European legislation is that international businesses and corporations have a stake in applying the same data protection standards, rather than having two different standards for European and

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[106] 15 U.S.C. § 45 (n).

[107] Joel Reidenberg, "Testimony of Joel Reidenberg before Subcommittee on Commerce, Trade and Consumer Protection, Committee on Energy and Commerce, United States House of Representatives," March 8, 2001.
< http://reidenberg.home.sprynet.com/Reidenberg_Testimony_03-08-01.htm>

[108] House Commerce Committee Chairman Billy Tauzin, quoted in Patrick Ross, "Congress Fears European Privacy Standards," *Cnetnews.com*, March 8, 2001.
<http://news.cnet.com/news/0-1005-200-5070401.html>

[109] *See* Mark Silbergeld, "Comments on the Department of Commerce Draft Safe Harbor Principles," November 19, 1998. Silbergeld spoke on behalf of Privacy International, Privacy Journal, Privacy Rights Clearinghouse, Privacy Times, and the U.S. Public Interest Research Group.behalf of the Center for Media Education, Consumer Federation of America, Consumers Union, Electronic Privacy Information Center, andJunkbusters.
<http://www.ita.doc.gov/ecom/com1abc.htm#silbergeld>.

American customers. Companies, such as Citibank, are already upgrading their data protection standards to the European level.[110] This spillover effect might, in the long run, affect the way the privacy debate develops in the United States. If "Big Business" and international corporations involved are already complying with more stringent data protection standards, less resistance can be expected from those companies against stricter data protection in the United States. These companies, hotel chains, car rental companies, air lines, might not have such a high stake in personal information (as an economic asset) as, for example, online retailers.

7. Comparison of European and American web sites' privacy policies

Against this background of emerging privacy legislation in Europe and the possibility of similar legislation being drafted in the United States, this study wanted to look if the different approaches (hands-on legislation in Europe, self regulation in the United States), have been translated to the online environment. Have the different legal approaches given rise to different information practices on American and European Web sites?

Previous studies such as the *Georgetown Internet Privacy Policy Survey*,[111] *FTC Study of 2000*[112] studied how well American web sites comply with fair information practices by analyzing privacy policies. They found that an increasing number of Web sites post privacy policies and comply to some extent with at least some of the fair information practices. In January 2001, Consumers International, a worldwide non-profit federation of consumer organizations conducted a similar study in a comparative perspective, comparing EU, American and Web sites from other countries. [113] The study found that, in general, the American Web sites had more and better privacy policies than the European sites. The study is interesting because of its comparative nature, but is not conducted with the same rigor as the abovementioned studies and the results and methodology are not always clear. This study tried to conduct a similar international comparison by using the methods of the FTC and Georgetown studies.

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[110] Gregory Shaffer, "Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards," 25 *Yale J. Int'l L.* 1 (2000), 79.

[111] Mary Culnan, "Georgetown Internet Privacy Policy Survey: A Report to the Federal Trade Commission," June 1999.
< http://www.msb.edu/faculty/culnanm/gippshome.html>

[112] Robert Pitofsky (chairman), "Fair Information Practices in the Electronic Market Place : a Report To Congress," May, 2000.

This study looked at how core fair information principles of notice, choice and access were respected in the online environment. Privacy disclosures were analyzed to assess if and how Web sites complied with these principles. Selected Web sites were scanned for information about their data protection principles. Not only the "privacy policies" were scanned, but also other areas of the sites where there might be some more information about the way the Web site handles personal information, such as user agreements, "terms and conditions" sections, general information sections, information provided on fill out forms, etc. The latter type of notices are called "information practices statements", as opposed to the more complete and extensive "privacy policies." Every piece of information the domain gave about its information practices was taken into account.

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[113] "An International Comparative Study of Privacy on the Internet," Consumers International, January, 2001. Can be downloaded from <http://www.consumersinternational.org/news/pressreleases/privacy250101.html>

7.1. Sample Selection, method, analysis

Two sets of Web sites were selected for this study. Because of language constraints there was a limit on the number of European countries that could be included in the sample. Only sites that were in Italian, Dutch, French, English and German[114] could be analyzed. Web sites from France, Germany, the United Kingdom, Belgium, the Netherlands and Italy were selected. Although these countries represent only six of the fifteen EU countries, population-wise they represent almost 300 million of the 376 million people living in EU countries.[115] This study looked at the most popular Web sites in every country. This seemed to be a better method than to pick Web sites randomly from any given country and analyze them. Not only would it have been hard to come up with a method to randomly select Web sites from any given country, but it was also more relevant in the context of this study to consider the most popular sites in the selected countries. Before we want to know how small, less "corporate" Web sites apply the fair information principles, we should first find out how the leading Web sites in any given country fare on this test. Therefore, studying the most popular Web sites was the obvious thing to do.

Alexa Research, an Internet research company, provided to no cost reliable data on Internet traffic for Europe that met professional standards, on its Web site.[116] Twelve sites from each country were randomly selected from top thirty lists for every country provided by the Alexa Research for the month of November, 2000. Only ten Belgian sites were selected in order to arrive at a round number of seventy Web sites. A random lottery number picker[117] was used to select these sites from the lists provided by Alexa. Only sites that collected personal information were studied. In the findings section will be discussed how many sites from each country were rejected on this basis. Also sites aimed at children and porn sites were not selected. Ideally, the Alexa Research service would also have been used to select seventy American sites, but the research tool provided only a list of thirty to forty-six Web sites per country for free; for more extensive lists, one needed to subscribe to the paid service. Because the American sample needed to be as big as the EU sample (seventy Web sites), the Alexa lists could not be used. The free service of Mediamatrix was used, which provides an alphabetic ranking of the 500 most visited Web sites in the United States for any given month. Sites were randomly picked until seventy American sites that collected personal data remained. This way of selecting a sample might have some flaws. There were some differences in the methodology Mediamatrix and Alexa Research applied to make their ranking. Financial and practical constraints made it impossible to have a different selection process. The most important issue is that we have two sets of samples, of which we can state with confidence that they consist of the most popular Web sites of the countries under study. This study looked at how the principles of notice, choice and access were respected in the respective samples.

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[114] The German sites were analyzed with the help of a native speaker.

[115] http://www.scb.se/eng/omscb/eu/befolkning.asp

[116] Alexa research has discontinued its free service, and now only offers paid services anymore, as do most of similar services. When this information was still for free, it was freely available on the Alexa Research. By entering search terms for the country and time frame one was interested in, one would be immediately be provided with a list. The data were generated on the spot, one did not need to register to access or pull

Notice

The notice principle requires that certain information is given to the data subject at the time of data collection. According to the Directive, this information should include

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up the data. No false statements were made to obtain these data, which were made available in the public domain by Alexa Research.

[117] http://www.simviation.com/fsdtlottery.htm

the identity of the controller[118] and the purpose of the processing.[119] The notice principle also requires that a data subject be notified about his right of access, which will be discussed in a different section. For the notice principle, these questions were asked:

- Does the privacy policy or information practices statement state anything about how long these data will be kept?
- Does the privacy policy or information practices statement offer any information about the identity of the data collector?
- Does the privacy policy or information practices statement explain how the site will use the collected data for internal purposes?

Choice

The choice requirement is designed to give the data subject control over his data, even after having given them out, and requires data controllers to give the data subject the opportunity to object to any further use of his data. This secondary use usually refers to the use of these data to send the data subject (commercial) messages, or the dissemination of these data to third parties, who might use these data for commercial or other purposes. This set of questions tries to measure to what extent Web sites informed and offered choice to its users about these practices.

- Does the privacy policy or information practices statement state whether or not the domain uses personal information it collects to send communications to the data subject?

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[118] article 10 (a).
[119] article 10 (b).

- If yes, does it state that it will use or will not use the personal information to send communications to the consumer (other than those directly related to processing an order or responding to a consumer's question)?
- If it says that it will use the personal information for such a purpose, does the site offer a choice to object to this use?
- If a choice is given, what does the data subject has to do in order to object to this use?

The same questions were asked to see whether or not a site informs the data subject if his data might be passed on (sold) to a third party and if he can object to this use.

This study also considered how the choice was presented to the data subject: by opting in, by opting out by clicking a box at the place where data are collected, by opting out at a different place in the Web site than the page where the data are collected,[120] or in another way. The distinction between the two kind of opt outs was made because there is a difference between someone being given the opportunity to unmark a box at the point where his data are being collected, and someone being alerted somewhere in a users agreement that he can call a number or write a certain address if he wants to object to a certain use of his data. In both instances, an opt out provision is present somewhere on the Web site, but they are radically different because the first one is easier to perform. Therefore, a distinction should be made between the two kinds of opt outs: opt outs at the place of data collection that can be performed by unclicking a box, and all the other kind of opt outs: unclicking a box at another place in the Web site, sending an email, making a phone call, etc. The Directive requires that opt out is offered at the same location as where data are collected.

Access

The access principle, whether or not a data subject is given the opportunity to review her personal data, to change them and/or to delete them, was tested by looking at whether the privacy disclosures said anything about any of these three areas.

- Does the information practices statement or privacy policy state that the site allows data subjects to review at least some personal information about them?
- Does the information practices statement or privacy policy state that the site allows data subjects to have inaccuracies corrected in the information about them?
- Does the information practices statement or privacy policy state that the site allows data subjects to review personal information about them?

This study also asked how the right to access was being granted to the data subjects : what did a data subject have to do when he wants to access, correct or delete his personal data? Could he exercise this right online, did he have to send an email, or did he have to use "traditional media" (snail mail, phone, fax) to exercise this right? Again, there is a substantial difference between some of these options, sending a letter to request a review of your data is more burdensome than clicking on a link and have immediate access to your data.

7.2. Summary of the results (SEE APPENDIX B FOR COMPLETE RESULTS)

Many sites collect a wide range of personal information about their users, which other studies had also found and which was confirmed here (for complete results, see

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[120] An example of this kind of opt out would be a Web site that offers an opt out by unchecking a box in the "terms and conditions" section of a site. Another example of this would be a Web site that lists a

appendix B.) There were some minor differences between American and European sites as far as collecting information goes, but overall the gathering of personal information seems to be widespread on the Internet, at least among the most popular Web sites collected in this sample. The American sites in the sample were a bit more likely to collect personal information; only two American sites were rejected from the sample on the basis that they did not collect information, compared to nine European sites.

The privacy disclosures on American sites usually are presented in the form of "privacy policies;" European privacy disclosures, on the other hand, are often more scattered all over the Web site in the form of "information practices policies." A possible explanation for this might be that the numerous privacy policy studies conducted in this country have raised the awareness among Web sites that these kind of disclosures are necessary and good business practices. From a privacy perspective, privacy policies can be preferred over information practices principles because they provide the data subject with a clear understanding about what a site's practices are like, without having to surf all over the site to find bits and pieces of information. However, information practices statements can also contain enough information to cover all the fair information practices principles.

The American privacy disclosures are more complete when it comes to notice principles. The American Web sites give more extensive information about the identity of the data controller (63 compared to 48 in the European sample), and more American than European sites informed the public about the internal use of their data (70-53). In general, the number of Web sites providing this kind of information was very high. Notice was

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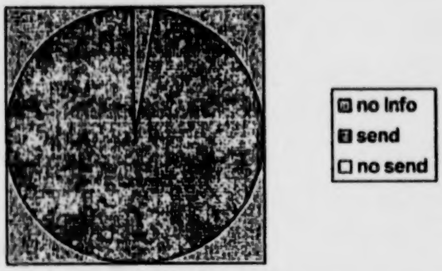
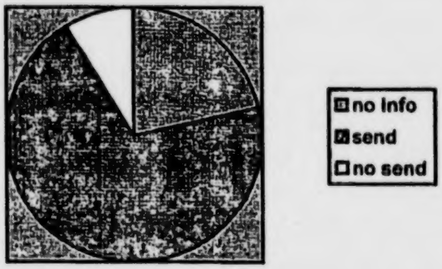
phone number or email address in its privacy policy one can use to object.

one of the better respected principles, even though most Web sites failed to mention how long the data would be kept for (use limitation principle).

The choice requirement left us with some unclear data because a number of European sites (12) did not mention anything about secondary use. Nine European sites and zero American sites stated they would not send any communications to the data subject (unrelated to the initial purpose.)



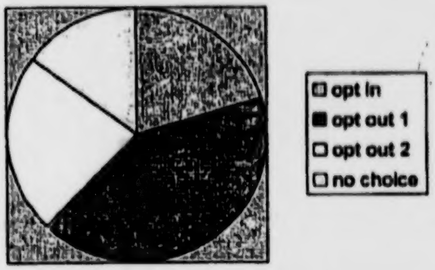
US



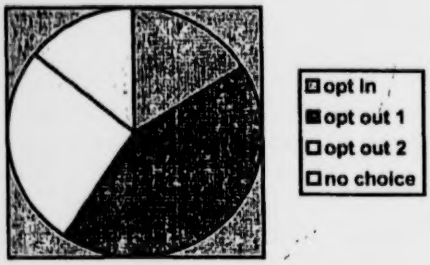
EU

However, that more American than European sites engage in these practices is not significant from a privacy standpoint. What is significant is whether data subjects may object to these uses. In that respect, the European and American sites were quite similar. Only a minority of the sites (14 of the 68 American sites and 8 of the 49 European sites that stated to intend to send communications to the consumer) are offering the opt in (required by the Working Party and Safe Harbor agreements) for secondary use (sending of communications) to consumers; almost half of them offered an opt out at the place of data collection (opt out 1) and over a third of the sites offered no choice, or a very complicated way to opt out (opt out2).

BEST COPY AVAILABLE

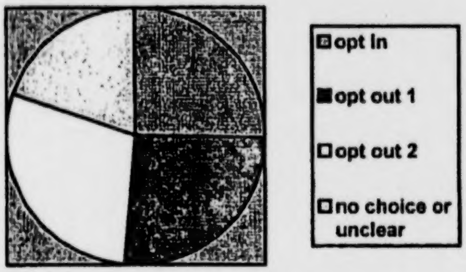


U.S. sample (n=68) : choice

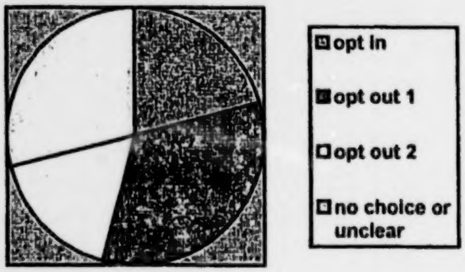


EU sample (n=49) : choice

For third party use (passing on of information to third parties), the difference between the two samples is greater. Only twenty-four European sites stated that they might pass information on to third parties, as opposed to fifty-one American sites. About half of the sites of each sample provide an opt in or opt out at the spot; the other half provide no choice or a complicated opt out. In both instances, the European and the American sites are similar when it comes to offering choice, though one could argue that since fewer European sites in the sample plan to send communications to consumers or to pass on personal information, the privacy situation is better in the European sample.



U.S. sample (n=51) : choice



EU sample (n=24) : choice

The most important conclusion seems to be that there are many Web sites in both samples with no, or burdensome, opt outs. On the other hand, only a minority of the sites offer no possibility to object. It seems as if the Web sites are aware that the option to object should be offered, but the way in which this option is offered still needs to be improved in order to fulfill the requirements of the fair information principles.

As far as access goes, more American than European sites provided an opportunity for data subjects to review and correct their data, and offered these options online, while slightly fewer European sites offered the data subject the opportunity to access and correct data. More importantly twice as many American sites offered these choices on line, whereas European sites required their customers to use the more burdensome traditional media (phone or mail) or email to exercise this right. However, more European than American sites in the sample offered the opportunity to *delete* personal data (23 versus 9). But although more sites from the European sample provide the opportunity to delete data than sites from the American sample, still more than half do not provide the right to deletion, or are unclear about how data can be deleted. The right to deletion is not as clear-cut as the right to review and correct. The Safe Harbor agreements, for example, state that deletion should be granted only for inaccurate data, and the Directive states that one should have the right to delete information only where it is processed unfairly or unlawfully. On the other hand, one could ague that if the personal data are not deleted after they have been used to fulfill the original service or contract, as the Directive and Working Party require, the data are processed unfairly. The Working Party is not totally clear on this issue.

As this summary of the findings shows, the American Web sites in the sample have more complete privacy disclosures than the European sample. Their disclosures can be found in all-compassing privacy policies rather than in information statements that are spread out over the site. They give out more information to the consumer about what they are doing than the sites in the European sample, for example, the notice principle was better respected by American Web sites than European Web sites in the sample. The European privacy disclosures are less elaborate and do not provide as much information to the consumer about some vital information practices. However, when it comes to offering the consumer choices about using his data for certain purposes, the European sites do about as well (or as badly) as the American sites. It also should be pointed out that more European sites explicitly state not to send communication to the data subject or pass their information on to third parties, which seems to suggest that the actual privacy threat is smaller in Europe than in the United States.

Still, in both samples there are still many practices in violation with the fair information principles. Despite these differences, the similarities are more striking. Even though the numbers for both samples vary, they are rarely at opposite ends of the spectrum. The data presented in this study, assuming that they are representative, seem to hint that all in all the differences in information practices between American and European Web sites is not that great. While more American sites seemed to be planning to use consumer data for secondary purposes than was the case for European sites, there was not a huge difference between American and European sites that did intend to use these data for secondary purposes in the way they offered choice. Huge differences were not found. Across the board one can say that Web sites seem to be aware of the public concern for privacy and that most Web sites address these concerns, but that not all the far information principles are being respected. These data provide hope as well as concerns for people concerned about on line privacy: hope, because most of the Web sites have policies about how to handle data and are aware that the public needs to be informed, and worries because there are still a number of changes that need to be made before some of the most fundamental privacy principles will be fully respected on line.

8 Conclusion and Discussion

This paper tried to explain the different philosophical and legal approaches towards privacy- and more specifically data protection- in the United States and in Europe. Based on that discussion, one would have expected a great variance between the privacy practices on European and American Web sites. However, the empirical research did not support this assumption. Despite the limitations on the research conducted in this paper, one clear conclusion is that there is no great difference between the extent to which popular European and American Web sites abide by the fair information principles. In some areas they both do well, they both fail in others. One should be careful about drawing too many conclusions from these data, but it is safe to say that, at least up until last year (the actual analysis was done in Fecruary-March 2001), the different legal frameworks did not lead to radically different practices in the online environment. Whether this is because the Directive is an inadequate legal framework to enforce privacy protection in the online environment, as some have suggested, or because the Directive simply has not been enforced strictly is something we cannot answer at this point. The implementation of the Directive encountered some significant delays, which makes it impossible to draw conclusions about its effectiveness to date. Upon embarking on this research project I had hoped that the enforcement of the Directive would have been further along, but unfortunately this is not the case. One other qualifier we should attach to these data is that by studying privacy policies one can only study what Web sites claim their practices are, rather than the actual practices.

However, even if the effect of the Directive cannot yet be measured, one should wonder whether or not the European Union jumped the gun by getting into a dispute with other nations, such as the United States, about Safe Harbor standards. It seems amazing that the European Union demands American Web sites to comply with data protection principles, when many of the most popular European sites do not even comply with them. These findings also undercut the European argument that privacy is a fundamental human right. If this really is the basis for data protection legislation, one would expect a stricter and swifter enforcement of the fair information practices in the online environment. This might still come, but the strong privacy-as-a- human-right argument loses power with each month of indecision. It might be expected that fair information principles will be enforced more strictly online in Europe in the near future, but it remains to be seen if they will be enforced as strictly as the Working Party has suggested. For example, there is very little evidence that Web sites currently abide by the use limitation principle, or that they keep information only as long as necessary to fulfill the contract with the consumer. One can wonder if this will really ever happen, because it would practically dry up the direct marketing resources.

Meanwhile, in the United States, the privacy debate rages on. The endless list of high profile privacy scandals, of companies not abiding by their own rules, using personal data in what many people consider inappropriate manner,[121] seem to have created a climate that is more conducive to enacting privacy legislation. Of course, there are many other aspects to considered: privacy legislation is expensive, and will Congress really impose expensive requirements upon an industry that already finds itself in trouble? A cost that, as opponents of data legislation have frequently argued, would be charged on to the consumer. Also, for all its concern expressed in polls, studies have found that the American public often does not even take the most basic privacy protections when using its computers.[122]

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[121] Many big Internet companies, including Yahoo, Doubleclick, AOL, Amazon, Microsoft,Real Player have sued or have received negative attention for privacy breaches.

One could also make the argument that privacy protection in the United States is guaranteed by the high degree of attention privacy scandals receive in the media, forcing most of the companies involved to clean up their acts. In Europe, on the other hand, the extent of privacy legislation might have given the citizens a false feeling of security, leaving companies only having to deal with privacy commissions-limited in resources- and not with powerful privacy advocacy groups. Davies has observed how public discussion and action groups about privacy in Europe have all but disappeared.[123] There are not the kind of privacy advocacy groups one finds in the United States, and as a result, less public debate and fewer public awareness. People and resources of these privacy commissions are limited, and their activities seem to focus more on formulating and crafting advice than to actively defending the "human right" that privacy is according to the European legal framework. It seems more likely that these commissions will be concentrating on high profile cases, rather than monitoring the Internet to see if every single Web site complies with the privacy legislation, a task for which the commissions might not be equipped. These commissions are often composed of professors and legal scholars, which implies that the focus is more on giving advice on interpretations of the privacy legislation than on enforcing the existing laws.

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[122] Robert MacMillan, "New Study Repeats Anti-Privacy-Legislation Mantra," *newsbytes.com,* May 16, 2001.
<http://www.newsbytes.com/news/01/165781.html>

[123] Simon Davies, "Re-Engineering the Right to Privacy: How Privacy Has Been Transformed from a Right to a Commodity," in *Technology and Privacy: The New Landscape,* Philip Agre and Marc Rotenberg, eds., 143-166, (Cambridge, Mass. : MIT Press, 1997), 196.

This brings to the fore one of the more fundamental criticisms of the European approach to data protection; that the whole framework for the Directive was developed in a time before the Internet, the time of centralized databases. As stated above, the principles of the Directive can be traced back to the guidelines offered by the HEW in 1974. Some claim that these principles are not designed to address informational privacy issues in the online environment.[124] The decentralized nature of the Internet was the justification the Clinton administration gave for choosing self regulation: "The Federal Government should recognize the unique qualities of the Internet including its *decentralized* nature and its tradition of bottom-up governance. Existing laws and regulations that may hinder electronic commerce should be revised or eliminated consistent with the unique nature of the Internet."[125] The Internet has greatly increased the amount of data gathering, and made it easier and cheaper for more people and organizations to collect data online; to expect one agency to keep track of all this might be too much to ask. Therefore it has been argued that compliance with the privacy principles will also have to be enforced through self regulation.

All this might seem not all that important, and perhaps it is not. In the large debate over privacy issues, the primary focus has been on consumer data, obscuring other important privacy issues such as work place privacy, protection against media intrusion, community notification of sex offenders and other areas that might be more crucial for our society. However, all those other areas of privacy can also be addressed from the philosophical framework laid out above: free flow of information vs. privacy as a human right.

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[124] David Aaron, "Privacy Across the Pond; U.S. Companies Soon Will Have a Safe Harbor Through Which to Navigate the Daunting Restrictions," *The Star Tribune*, Sunday, June 4, 2000. A-3.
[125] William Clinton, "Presidential Directive, Memorandum for the Heads of Executive Departments and Agencies," July 1, 1997.

With the further development of technologies that could be used for intrusive activities by government, media, employers, insurance companies, law enforcement, private citizens and many others, the privacy question will remain prominent and put pressure on the traditional libertarian privacy paradigm in which the free flow of and access to information, together with a limited role for government regulation, are highly valued. Whether this paradigm will shift in the future towards a more "European" paradigm is something that we cannot know, but the case of online privacy presents an important test for what the American approach towards privacy will be in the twenty-first century -not only in regard to online privacy, but in the many other privacy areas as well.

<http://www.whitehouse.gov/WH/New/Commerce/directive.html>

Appendix A: questionnaire

Survey Questions.
Write down the URL of the website:
Whar kind of web site is this;
Retail Information Portal Financial Other :

1. Does this site collect information about its users? **YES NO**
2. Does the domain collect email addresses? **YES NO**

C(ompulsory) O(ptional)

3. Does the domain collect required PII other than email addresses? YES NO

Indicate which: Name

Postal address	C	O
Telephone #	C	O
Fax #	C	O
Credit card #	C	O
Social security/passport #	C	O

4. Does the domain collect optional PII other than email addresses?

Indicate which: Name	C	O
Postal address	C	O
Fax #	C	O
Social security/passport #	C	O
Credit Card #	C	O

If answer to question 2, 3 and 4 was no: stop survey here.

5. Does the site collect non identifying-information?

Age/birthdate	C	O
Gender	C	O
Education	C	O
ZIP code	C	O
Occpation	C	O
Interests or hobies	C	O
Type of hardware/ software used	C	O
Income	C	O

6.Is there any kind of privacy policy statement posted on the site? **YES NO**
7 Is there an information practices statement posted on the site? **YES NO**

8. At the point where the information was collected, is the consumer alerted to this policy? **(this question was not used in study)**

YES – NO

- hyperlink.
- mentioning of its existence but not linking to it.
- Privacy policy pops up automatically in a pop up window.
- other
- can not be assessed

9.Does the pp ips say anything about what information it collects? **(This question was not used in study)**

YES- NO

10.Does the privacy policy or information practices statement state anything about how long these data will be kept?

- destroyed immediately after the use for contractual obligation.
- Other: write down

11 Does the privacy policy or information practices statement offer any information about the identity of the data collector?

YES NO

If Yes - Name
- Contact info

12. Does the privacy policy or information practices statement explain how the site will use the collected data for internal purposes?

YES NO

If no, skip to 16
If yes, go to 13

13. Does the pp/isp say anything about whether the domain uses personal information it collects to send communications to the consumer?

YES NO

If no, go to 17
If yes go to 15

14. Choose one of these two options:

a) the pp/ips says that the domain does or may use personal information to send communications to the consumer (other than those directly related to processing an order or responding to a consumer's question).

b)The pp ips says that the domain does not use personal information to send communications to the consumer.

If a) go to 15
b) skip to 16

15. Site offer choice to the user to object to this use.

- no.
- yes, through opt in at point where data were collected(check this).
- yes, through opt out at point where data were collected (check this)
- yes through opt out on line, at a place other than where the data were collected
- yes by sending an email
- yes by snail mail or phone call
- says it offers choice, but it is unclear how.
- other: write down.

16. Does the ppi/ips say anything about whether the domain discloses personal information it collects to third parties?

YES NO

If no, skip to 19
If yes, go to 17

17. Choose one of the following numbers and circle the number:

a. The pp ips says that the domain does or may use personal identifying information to third parties

b The pp ips says that the domain does not use personal information to send communications to the consumer, or does so only

- as required by law
- as necessary to process an order
- in aggregate or non-identifying form

If a) go to 18
If b) go to 19

18. does the domain offer choice to the user to object to this use?

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- no.
- yes, through opt in at point where data were collected(check this).
- yes, through opt out at point where data were collected (check this)
- yes through opt out, at a place other than where the data were collected
- yes by sending an email
- yes by snail mail or phone call
- says it offers choice, but it is unclear how.
- other: write down.

19. Does the pp/ips statement say that the domain allows consumers to review at least some personal information about them.? **YES NO**

IF YES, HOW CAN THIS BE DONE?
Online
Fax
Phone
Email
Other:

20. Does the pp/ips statement say that the domain allows consumers to have inaccuracies corrected in at least some personal information about them?

YES NO

IF YES, HOW CAN THIS BE DONE?
Online
Fax
Phone
Email
Other:

21. Does the pp/ ips say that it allows consumers to have at least some personal information about them deleted?

YES NO

IF YES, HOW CAN THIS BE DONE?
Online
Fax
Phone
Email
Other:

22. Does the pp/ips say that the domain takes any steps to provide security?

YES - NO

23. Guarantee for how long policy will remain unchanged?

YES - NO

- policy might change
- your data will remain to be processed under the existing policy

.24. (only for European Web sites)

Is the privacy commission mentioned anywhere on the Web site?
- mentioned without contact info.
- mentioned with link
- mentioned with contact info other than link

25. For American sites only: does the site carry a privacy seal?

Appendix B : results

Collection of personal identifiable information

	United States			European sample		
	Comp.	Opt.	Total	Comp.	Opt.	Total
Name	62	3	**65**	65	1	**66**
Address	**48**	**9**	**57**	**48**	**8**	**56**
Telephone #	30	7	**37**	25	16	**41**
Credit Card #	7	14	**21**	4	2	**6**
Email	**68**	2	**70**	56	9	**65**

Collection of non PII

	United States			European Sample		
	Comp.	Opt.	Total	Comp.	Opt.	Total
Age	16	17	**33**	29	**8**	**37**
Gender	19	11	**30**	32	9	**41**
Education	3	6	**9**	4	5	**9**
Zip code	34	5	**39**	14	4	**18**
Occupation	2	7	**9**	6	10	**16**
Interests	4	17	**21**	6	13	**19**
Software used	6	0	**6**	2	1	**3**
Income	3	4	**7**	2	1	**3**

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Privacy disclosures

	United States	European Sample
Privacy Policy	68	44
Information Practices	2	20
None of the above	0	6

identity of data controller

	United States	European Sample
No info	7	22
Incomplete info	38	19
Full info	25	29

Info about Internal use

	United States	European Sample
Info	70	53
No info	0	17

choice – info about secondary use.

	United States	European Sample
Info	68	58
"Yes, we will send"	68	49
"No, won't send"	0	9[126]

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[126] Three Web sites are included in this number that actually did not say anything about this issue, but stated that they would destroy the data after they had been used for their original purpose, therefore it is safe to assume that these data will not be used for any other secondary purpose.

choice- secondary use.

	United States (n = 68)	European Sample (n=49)
Opt In	14	8
Opt out on spot	28	21
Opt out elsewhere (online/ email/ traditional media)	15 (6/10/0)	13 (2/4/7)
No choice/unclear	10	7

choice- info about third party use.

	United States	European Sample
Info	69	54
"Yes will pass on"	51	24
"No will not pass on"	18	30[127]

choice – opt out third party use

	United States (n= 51)	European sample (n=24)
Opt in	13	5
Opt out on the spot	13	8
Opt out elsewhere on the site/email/mail	15 (8/7/0)	4 (3/0/1)
No choice/ unclear	10 (4/6)	7 (2/5)

review

	United Sates	European Sample
Online	36	18
Email	4	8
Traditional media	1	10
Unclear	2	7
No access/ not mentioned	27	27

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[127] Three Web sites are included in this number that actually did not say anything about this issue, but stated that they would destroy the data after they had been used for their original purpose therefore it is safe to assume that these data will not be used for any other secondary purpose.

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correction

	United States	European sample
Online	35	17
By Email	4	9
Traditional media	2	10
Unclear	4	6
No correction	25	28

deletion

	United States	Europe
Automatic deletion	0	3
Online	10	10
By Email	5	10
Traditional media	2	6
Unclear	2	4
No option to delete data	51	37

Table 12 : security – duration.

	United States	European Union
No mention	37	60
Might change	24	8
Data remain under old privacy regime	9	2

Appendix C: Sites

Dutch sites

www.debeurs.nl	Financial
www.kaartenhuis.nl	Portal
www.veiling.nl	Auction
www.noknok.nl	Info
www.ajax.nl	Retail
www.hetnet.nl	Portal
www.ilse.nl	Portal
www.&émove.nl	Portal
www.etoka,nl	Information
www.rabobank.nl	Financial
www.ministerboard.nl	Information
www.detelegraaf.nl	Information

Italian sites

www.katamail.it	Email
www.iol.it	Portal
www.lucky.it	Game
www.alitalia.it	Retail/info
www.jumpy.it	Information
www.secondomano.it	Auction
www.buongiorno.it	Info/portal
www.firenze.net.nl	Info/portal
www.corriere.it	Information
www.yahoo.it	Portal
www.soldionline.it	email service
www.mondadori.com	Portal

Belgian Sites

www.vdab.be	Information
www.swing.be	Portal
www.kanaal2.be	Information
www.bbl.be	Financial
www.tijd.be	Information
www.telenet.be	Information
www.immoweb.be	Information
www.pproxus.be	Retail
www.rendez-vous,be	Info
www.ibazar.be	Auction

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French Sites

www.respubica.be	Portal
www.bol.fr	Retail
www.tf1.fr	Portal
www.chez.com	Info
www.milkado.fr	Gaming
www.multimania.com	Portal
www.cerclo.fr	Information
www.sports4fun.com	Gambling
www.lemonde.fr	Information
www.lycos.fr	Portal
www.aufeminin.org	Information
www.free.fr	Information

German Sites

www.spiegel.de	Information
www.fireball.de	Portal
www.rtl.de	Information
www.amica.de	Information
www.jobpilot.de	Information
www.womenweb.de	Information
www,hafas,de	Retail
www.lycos.de	Portal
www.computerchannel.de	Information
www.telekom.de	Information
www.chip.de	Portal
www.siemens.de	Retail

United Kingdom Sites

www.ft.com	Information
www.lineone.net	Portal
www.tesco.co.uk	Retail
www.iii.co.uk	Finanancial
www.sky.co.uk	Portal
www.bananalotto.com	Game
www.bt.com	Information
www.fool.co.uk	Portal
www.genie.co.uk	Information
www.lastminute.com	Information
www.rivals.net	Information
www.dabs.com	Retail

American Sites

www.edmunds.com	Information
www.moviefone.com	Information
www.netflip.com	Information
www.primetime.com	Port
www.pcworld.com	Information
www.rr.com	Information
www.thebirthdaygame.com	Game/info
www.oxygen.com	Information
www.pogo.com	Quiz-game
www.officemax.com	Information
www.cooking.com	Information
www.money.com	Retail
www.yahoo.com	Portal
www.contentmail.com	Information
www.bizrate.com	Retail
www.feder.com	Retail
www.palm.com	Retail
www.jobsonline.com	Information
www.intellicost.com	Information
www.thinkquest.org	Information
www.tvguide.com	Information
www.earthlink.net	Portal
www.etrade.com	Financial
www.evoice.com	Information
www.nascar.com	Information
www.barnesandnoble.com	Retail
www.grouplotto.com	Games
www.1-800-flowers.com	Retail
www.citibank.com	Financial
www.flipside.net	Games
www.unitited.com	Information
www.intuit.com	Information
www.webshots.com	Information
www.nextcard.com	Information
www.keen.com	Information
www.yourfreeprize.com	Information
www.eddiebauer.com	Retail
www.jcpenny.com	Retail
www.buy.com	Retail

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www.delphi.com	Chat
www.etour.com	Info
www.firstusa.com	Financial
www.grab.com	Games
www.mcafee.com	Retail
www.classmates.com	Information
www.walmart.com	Retail
www.ancestry.com	Information
www.adobe.com	Retail
www.mapsanus.com	Information
www.verizon.com	Information
www.foodtv.com	Retail
www.flipside.com	Games
www.real.com	Reail-service
www.usps.com	Retail
www.ford.com	Information
www.sandboy.com	Information
www.washingpost.com	Information
www.americangreetings.com	Retail
www.foxsports.com	Information
www.britannica.com	Information
www.sonicnet.com	Retail
www.victoriasecret.com	Retail
www.cdnow.com	Retail
www.lightspeedpanel.com	Information
www.nwa.com	Retail
www.edmunds.com	Retail
www.blockbuster.com	Retail
www.the globe.com	Portal
www.fingerhut.com	Information
www.nailbits.com	Information

"An Evil Act": The Battle to Define Communication in Texas v. Johnson

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"An Evil Act": The Battle to Define Communication in Texas v. Johnson

ABSTRACT

This essay analyzed U.S. Senate debate over the proposed Flag Protection Amendment to reveal how political opponents legally and morally defined "speech" based on the Texas v. Johnson case. It found that by altering our legal definition of communication to favor the community over the individual, the amendment would remove not only First Amendment protection for symbolic expression, but also remove the individual citizen's legal ability to discern for him/herself whether communication even occurred. Social order would thus achieve the constitutional power to overrule citizen autonomy guaranteed by the First Amendment, impacting democratic decision-making.

"An Evil Act": The Battle to Define Communication in Texas v. Johnson

Texas v. Johnson (1989) offers one of the most compelling and continuing tests of our country's "bedrock principle" that government cannot censor expression simply because society finds it offensive or disagreeable (p. 414). However, the Court's decision was only the starting-place of an enduring and significant controversy. Its legacy lies in congressional attempts to override that bedrock principle by categorizing flag burning as non-speech or worthless speech. Taking its cue from the State of Texas, the Flag Protection Amendment political movement seeks to create an exception to the First Amendment based in the "legitimate and substantial interest" of a national unity maintained by the physical integrity of the flag (Johnson v. Texas, 1986, p. 124). This movement interprets the symbolic behavior of flag burning as a solely physical act that violates the tenets of moral patriotism and therefore constitutes immoral conduct against the state that can lawfully be prohibited. Senator Max Cleland (D-Georgia) explained: "The flag unites Americans as no symbol can. The flag is sacred. Those who desecrate the flag would desecrate America and the freedoms that we hold inviolate" (Cong. Rec., 1999, p. S2866).

Johnson thus captures the classic confrontation between government to protect the individual versus government to create a better society, and the very different free-expression parameters the victor would enact. To delineate those parameters and define their significance, this essay discusses the facts of the case, the lower court decisions, the Supreme Court decision and dissents, and the societal/political controversy it spawned.

The essay analyzes U.S. Senate debate over the Flag Protection Amendment to reveal how political opponents legally and morally define "speech" based on the Johnson case. These politically-driven definitions are socially significant for, agreed to or not, they can dictate by law what communicates and what does not communicate, and thus what is or is not protected or allowed expression in our society.

Facts of the Case

The Republican National Convention brought Gregory Lee Johnson to Dallas, Texas, in August 1984. The Party was about to re-nominate Ronald Reagan as President of the United States, and the convention attracted not only thousands of delegates, but ndreds of protestors. Johnson was a participant in the "Republican War Chest Tour" demonstration, which protested the policies of the Reagan administration and of certain Dallas-based corporations.

Marching through the Dallas streets, the 100 or so War Chest demonstrators denounced political candidates, the military, and corporate America by distributing protest literature and chanting such slogans as: "Ronald Reagan, killer of the hour, Perfect example of U.S. power [sic]," and "Reagan, Mondale, which will it be? Either one means World War III" (Johnson, p. 431). The group also stopped at several corporate locations to stage die-ins intended to dramatize the effects of nuclear war. Some group members reached beyond such vocal, but peaceful, dissent and began spray-painting walls of buildings and overturning potted plants. Johnson, however, was not involved in the vandalism.

In the excitement, one of the protesters stole an American flag from outside one of the targeted downtown corporate office buildings and gave it to Johnson. He carried it with him to the group's final destination, Dallas City Hall. In a final act of protest, Johnson unfurled the American flag, soaked it in kerosene obtained from some unknown source, and ignited it. As the flag burned to charred remnants, the group chanted: "America, the red, white, and blue, we spit on you, you stand for plunder, you will go under" (p. 431).

Fire draws a crowd, and many of the observers later testified they were deeply offended by the flag burning, although no one was physically injured or threatened with injury during the protest march. When the demonstrators had left, one of the witnesses, Daniel Walker, collected the flag's remains, took them home, and respectfully buried them in his back yard according to codified procedure.

Of the approximately 100 demonstrators involved, the police charged only Gregory Johnson with a crime. Police arrested him for violating a criminal statute, "Desecration of [a] Venerated Object," which stated that a "person commits an offense if he intentionally or knowingly desecrates…a state or national flag." Under the statute, "'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action" (Texas Penal Code Annotated Section 42.09[a][3]).

The Lower Courts

When Johnson went to trial, Daniel Walker told the jury the flag burning offended his feelings, thus evidencing the statute. The prosecutor also claimed Johnson breached the peace and posed a danger to Texas "by what he does and the way he thinks" (Irons, 1997, p. 218). The jury agreed, convicting Johnson and sentencing him to one year in prison and a $2,000 fine. The Court of Appeals for the Fifth District of Texas, while acknowledging that Johnson did engage in symbolic speech, affirmed his conviction. The Court stated that the desecration statute was a legitimate and constitutional means of protecting the public peace, and of protecting the flag as a symbol of national unity (Johnson v. Texas, 1986).

Johnson then appealed to the highest court in Texas, the Court of Criminal Appeals, which reiterated that flag burning was indeed a form of symbolic speech, but said that the lower court did not meet the required level of scrutiny. After effecting such scrutiny, the court decided the desecration statute, as applied, did violate Johnson's First Amendment rights (Johnson v. Texas, 1988). The State of Texas disagreed and appealed to the United States Supreme Court. In a 5-4 decision that mirrored the Court of Criminal Appeal's reasoning, the Supreme Court affirmed the reversal.

The Supreme Court Decision

Texas conceded that Johnson's conduct was expressive, but argued for the two substantial state interests that arguably would override that expression. Conceding the point was not enough for majority opinion writer Justice William Brennan, who saw expressive conduct as the key constitutional element. The speech-versus-conduct test assumes that verbal expression is "pure speech" entitled to full First Amendment protection, whereas conduct can be regulated. But sometimes conduct carries an expressive element that is nonverbal in nature. If an activity is essentially communicative, a court could view it for what it is: symbolic speech (Spence v. Washington, 1974, pp. 409-411). As such, expressive conduct "is entitled to full First Amendment protection just as if it were as communicative in substance as it is in form" (Gillmor et al., 1998, p. 81). Brennan's first task, then, was to clarify just how the symbolic-speech standard applied to Johnson's particular circumstances. Only then could he properly gauge Texas' compelling interests.

For Brennan, the focal question in this case was "the context in which it occurred" (Texas v. Johnson, 1989, p.405). The case did not concern all expressive physical conduct regarding the flag, but only the burning of a flag as a form of symbolic political expression. Brennan concluded that the "expressive, overtly political nature of [Johnson's] conduct was both intentional and overwhelmingly apparent" and "'sufficiently imbued with elements of communication'...to implicate the First Amendment" (p. 406). The importance of such clarification lies in Brennan's argument that because Johnson did engage in expression, the Texas statute was directed against suppressing a message; it was not content neutral. So the "less stringent standard" developed in United States v. O'Brien (1968) did not apply (Texas v. Johnson, 1989, pp. 403-407). Flag burning must be subjected to the exacting standards of strict scrutiny tests that require the government to justify its regulation with compelling interests and that utilize the least restrictive means of achieving those interests.

Brennan then addressed the substantial state interests that Texas used to justify its conviction: (1) preventing breaches of the peace and (2) preserving the flag as a symbol of nationhood and national unity. Brennan agreed with the Texas high court and held that the first interest was not implicated but that the second was related to the suppression of expression.

Justice Brennan considered the breach-of-peace interest from two perspectives, one of causation and the other of reactive harms. Brennan acknowledged that government can more easily restrict expressive conduct than pure speech, but clarified his acknowledgement by declaring that suppressing either form of communication "must be justified by the substantial showing of the need that the First Amendment requires" (p. 406).

The State of Texas, wrote Brennan, provided no such supporting evidence but relied solely on presumption of potential dangers. Since no disturbance of the peace actually occurred or threatened to occur because of the flag burning, the state's evidence amounted to people claiming they were seriously offended, and an emotional reaction is not enough to prohibit speech. Rather, Brennan declared, quoting Justice Oliver Wendell Holmes, political speech "'invites dispute'" for it "'may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger'" (pp. 408-409). In essence, Texas wanted to resurrect the Court's clear and probable danger test from Dennis v. United States (1951) that permitted the government to stop speech before it had a chance to create a real danger. This was the bad tendency test that Chief Justice Rehnquist himself applied in his Johnson dissent (discussed below).[i] Brennan would have none of it, stating that such a decision would "eviscerate" the Brandenburg v. Ohio (1969) incitement standard (Texas v. Johnson,1989, p. 409).

Brennan similarly dismissed any application of Chaplinsky v. New Hampshire's (1942) fighting-words doctrine, stating that Johnson's generalized expression could not be construed as a direct personal insult. Brennan concluded that Texas had a separate breach of peace statute to maintain order, so it need not impinge on the First Amendment to keep the peace.

The Justice then addressed the state's second compelling interest:

> According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited. (Texas v. Johnson, 1989, p. 413)

Brennan then reeled off 13 Supreme Court cases to evidence his classic statement that if "there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" (p. 414). He followed by clarifying that not even the flag has been exempted from this principle and that the principle is not dependent on the particular mode of expression selected.

Brennan further clarified that the Court had never before held—and would not hold with Johnson—that the government could prescribe orthodoxy or characterize a symbol as expressing only one view ((pp. 415, 417). Finally, Brennan refused to create a First Amendment exception for the flag because punishing its desecration does not make it sacred, but punishment does dilute the freedoms it represents. "We can imagine no more appropriate response to burning a flag," he wrote, "than waving one's own" (p. 420).

In affirming the previous decision of the Texas Court of Criminal Appeals, the majority's position was clear: Laws banning the desecration of venerated objects will always be content-based. The mere desire of government to promote national unity is never enough, on its own, to justify abridgement of speech.

The Supreme Court Dissenters

Chief Justice William Rehnquist and Justice John Paul Stevens, however, saw the American flag as an exception to the command of the First Amendment. These dissents are significant because, in building on the State of Texas' argument, they provide and legitimize the legal and moral patriotic foundations for the ensuing political flag protection movement.

Rehnquist, joined by Justices Byron White and Sandra Day O'Connor, believed the Texas statute was constitutional under the First Amendment, as applied in this case, for two reasons. First, Rehnquist argued that the flag had become "a visible symbol embodying our Nation...It is not simply another `idea' or `point of view' competing for recognition in the marketplace of ideas" (p. 429). Using eight pages of text, Rehnquist provided a history lesson of our country's laws, jurisprudence, myths, hymns, facts, and values that imbued the flag with a unique status among symbols. According to Rehnquist, the flag captures our patriotism, our nationalism, and is thus held in "mystical reverence" by "millions and millions of Americans" (p. 429). How can it not be protected? Rehnquist wondered.

Second, Rehnquist believed the public burning of the American flag in this case "was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace" (p. 430). He argued that flag burning "is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others" (p. 432). Rehnquist further argued that the statute thus deprived Johnson of only one rather inarticulate symbolic form of protest, "and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy" (p. 432).

Thus, wrote Rehnquist, Texas was not punishing Johnson for his message, but for his use of this particular symbol. Besides, concluded Rehnquist in a footnote, the majority did not even consider Johnson's claim that the Texas statute was unconstitutional on its face. Calling on precedent, Rehnquist argued that the statute was constitutional because it was not vague or overbroad; "ordinary people" could understand and comply with it (pp. 435-436).

Justice Stevens, in an accompanying dissent, made three major points. First, sanctioning flag desecration will tarnish the value of the flag as a national symbol, a tarnish that "is not justified by the trivial burden on free expression occasioned by requiring" that alternative modes of expression be employed (p. 437). Second, the Texas statute does not prescribe orthodox views or "compel any conduct or expression of respect for any idea or symbol" (p. 437). Third, the Texas statute is content neutral: "The concept of `desecration' does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense" (p. 438). Stevens said Texas did not prosecute Johnson for his criticism of government policies—for his content—but for the manner he chose to express his views. As with protecting the Lincoln Memorial from defacement, Texas' legitimate interest in preserving the quality of an important national asset supports a prohibition of Johnson's flag-burning method.

Rehnquist and Stevens thus avoided considering any strict scrutiny test in Johnson. In essence, they sought to create a new category of unprotected speech akin to obscenity.

Creating a National Debate

In concluding his dissent, Chief Justice Rehnquist said that "surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning" (p. 435). These words, echoed by Justice Stevens, inspired Congress and a large portion of the U.S. populace to rally for the flag, producing Texas v. Johnson's legacy: a continuing political, legal, moral, and societal debate over the parameters of symbolic expression. This debate greatly enriches Johnson for communication researchers.

While citizen organizations across the country have engaged the debate, its focal point remains in the United States Congress. Heated reaction to the Johnson decision swept Congress. The very next day House members promised to introduce a constitutional amendment to give Congress and the states the power to prohibit the physical desecration of the U.S. flag (Cong. Rec., 1989, p. H2999). Just one month later, the Senate considered both a constitutional amendment and The Flag Protection Act of 1989, which proposed amending the federal flag desecration statute (pp. S8087, S8090).

In fall 1989 both the House and the Senate approved the statute (pp. H5562, S12655). Under this statute whoever "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground or tramples upon any flag of the United States shall be fined under this Title or imprisoned for not more than one year, or both" (Flag Protection Act of 1989). An exception permitted disposal for a worn or soiled flag. Also in October 1989, the proposed constitutional amendment failed to obtain the necessary two-thirds vote of the Senate (Cong. Rec., pp. S13733).

Eight months later in United States v. Eichman (1990), the Supreme Court relied upon Johnson to strike down the 1989 federal statute. Eichman consolidated two flag-burning cases in one appeal. The first involved persons—including Gregory Lee Johnson—who burned several U.S. flags on the steps of the U.S. Capitol while protesting American foreign policy. The second concerned individuals who burned a U.S. flag in Seattle while protesting passage of the 1989 Flag Protection Act.

Once the Supreme Court ruled for a second time that flag burning was expressive speech protected by the First Amendment, opponents of flag burning realized that no statute could adequately protect the U.S. flag from desecration. They recognized that only a constitutional amendment could overturn Johnson and Eichman.[ii] In 1990, 1995, 1997, 1998, 1999, and 2000 both House and Senate debated such an amendment. The House continually passed it and the Senate narrowly defeated it. Flag Protection Amendment co-sponsor Senator Orrin Hatch (R-Utah) again reintroduced the bill in March 2001.

The Flag Debate's Value to Communication Studies

The Congressional debate clarifies two analytical foci concerning Johnson: the case itself and the ensuing political and societal debate. While numerous law journal articles analyze the legal principles established by the Court (which this essay does not pursue) a few communication scholars provided new ways to view the majority and dissents in Johnson. Heather Hundley (1997), for example, used a semiotic analysis to reveal that the Justices were disagreeing because they were decoding the "flag" differently: some as symbolic, others as iconic. The advocates of such disparate representations could not find core values to build consensus. Stuart Kaplan (1999), meanwhile, first used Johnson to describe the evolution of the symbolic speech concept, then examined the implicit theories of visual communication that seem to explain "why judges have ruled the way they have in this area of jurisprudence" (p. 3).

This essay, however, steps beyond the case to present a new arena for communication investigation, one too commonly overlooked but rich in possibilities: the debate spawned by Johnson. Throughout the legislative process involving the flag protection statute and amendment, testimony from members of Congress, legal scholars, and average citizens clearly defined this continuing national controversy. The arguments from that debate can be used as data for communication studies ranging from value analysis and semiotics to various historical, interpersonal, or rhetorical approaches.

But this controversy also provides one argument that engages the most basic level of communication: a debate over message creation, transmission, and reception. Flag protection proponents argue that the act of burning a flag carries no message, while opponents state it is indeed a communicative moment. The essay thus focuses on three premises flag amendment supporters use that clarify how they deny the presence of communication: 1) the U.S. flag's unique status places it above the need to consider communicative value, 2) flag burning is conduct—a physical, non-communicative act subject to regulation, and 3) only written or spoken words engage the communication process.

Franklyn S. Haiman's (1993) nonverbal symbolic communication theory, which he used to denounce "speech act" legal thinking, drives the analysis. Haiman focused on the ideas and meanings communicated between people and claimed that, whether it is called an act or not, "it is still essentially a symbolic, not a physical, transaction [sic]" (p. 5). Haiman continued to write:

> And though it is true that symbols can, and commonly do, arouse physiological as well as mental responses in their audience, the mental response comes first and mediates what follows. Without a response of the mind, nothing follows, for nothing has been comprehended....Thus...a fundamental difference obtains between symbolic and nonsymbolic interactions and that the First Amendment is always [sic] implicated in the former and only occasionally in the latter. (p. 5)

In conjunction with Haiman's theory, this essay subscribes to Dance & Larson's (1976) postulate of communication, which they established through a content analysis of several decades of such presuppositions: "A communicative act carries with it the implicit assumption that the symbolic content one produces will be consumed by another according to the same code that governed its generation" (p. 36).

The selected quotations represent broadly held concepts that reverberate at all levels of discussion over the thirteen-year history of the flag burning controversy.[iii] Space considerations narrow the focus to Senate debate, which reveals not only how political opponents legally and morally define "speech" based on the Johnson case, but how they use these definitions to further their political ends. Such definitions and uses are important to comprehend because this is not just another academic debate; it is a statutory debate in our country's highest legislative body. The congressional decision can dictate by law what is, and what is not, a communicative message, and thus what is allowable speech in our society.

1—Unique Status: In defining their position, proponents of flag protection reflected Chief Justice Rehnquist's dissent by emphasizing the emotional and moral attachment of Americans to the flag and the perceived need to protect this attachment from physical assault. Amendment supporters based their position in what Alasdair MacIntyre (1984) called the "morality of patriotism," a deeply-felt, shared cultural perspective that develops a person as a moral agent. It is defined by a proprietary love of one's country, a pride in its distinctive merits, a gratitude for benefits enjoyed, and, at some point, an uncritical acceptance of national goals and mores.

Senate amendment co-sponsor Orrin Hatch clarified emotional and cultural elements of moral patriotism in March 2000. Hatch spoke of how Mike Christian, one of Senator John McCain's (R-Arizona) cell mates at the "Hanoi Hilton" during the Vietnam War, painstakingly made U.S. flags out of bits of cloth to inspire other American prisoners, only to suffer life-threatening beatings for his efforts:

> If a makeshift flag can stir such emotions, it is illogical for the Senate to ignore the feelings of the overwhelming number of Americans who support flag protection. The flag is not just a piece of cloth or a symbol. It is the embodiment of our heritage, our liberties, and indeed our sovereignty as a nation. The American flag unites Americans because it embodies shared values and history. (Cong. Rec., 2000, p. S1833)

Hatch's co-sponsor, Vietnam War hero Senator Max Cleland, pursued the morality of patriotism, emphasizing its particular world-view, shared cultural perspective, and proprietary love of country:

> The flag is not a mere symbol. It is not just a symbol of America. It is America. It is what we stand for. It is what we believe in. It is sacred. (Cong. Rec., 1998, p. S396)

Moral patriotic values in fact became a significant aspect of the flag protection argument, for moral patriots regard those outside their community as having lost hold of genuine standards of judgment, as Senator Bob Smith (R-New Hampshire) explained:

> The desecration of the flag…is about us as a people….We have moral decay in this country. We are falling apart at the seams because…there is no personal accountability. Desecrate graves, stomp the flag, disrespect veterans. It is OK. Spit on the flag. That is OK, it is free speech…. It is wrong to desecrate the flag….The flag is the essence of America. (Cong. Rec., 2000, p. S1719)

These quotations elucidate two familiar premises of amendment backers: the unique status of the flag and its nationally-unifying nature. Such status and nature, the argument states, should elevate the American flag above First Amendment implications of speech. As Justice Rehnquist said, the flag "is not simply another idea…competing in the marketplace of ideas" (Texas v. Johnson, 1989, p. 429). This argument sidesteps the need to even discuss symbolic expression as a communicative act, for it removes the communication channel. Even if someone could ascertain a message from witnessing a flag burning, the opportunity to send the message would be outlawed and suppressed by fear of punishment.

Yet, the above quotations also indicate that flag protection supporters do suggest that the U.S. flag carries symbolic expression and communicates a distinct message to the world. Justice Stevens's dissent is an often-used refrain:

> [The American flag] is a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations. The symbol carries its message to dissidents both at home and abroad who may have

> no interest at all in our national unity or survival. The value of the flag as a symbol cannot be measured....Sanctioning the public desecration of the flag will tarnish its value. (Johnson, p. 437)

When reintroducing the bill to Congress in 2001, Senator Cleland clarified the hierarchy of flag symbolism and its implications:

> The societal interest in preserving the symbolic value of the flag outweighs the interest of an individual who chooses to physically desecrate the flag. The flag unites Americans as no symbol can. If the American flag is not sacred, what in the world is? (Kapos, 2001, p. A1)

Proponents thus claim that, of itself, the flag does communicate, does carry with it the implicit assumption that the symbolic content will be decoded by a receiver. But when someone does something to or with the flag—such as burn it—proponents claim the physical act of igniting the flag and the physical act of fire destroying it, is equivalent to "an inarticulate grunt or roar" that is not communicative (Texas v. Johnson, 1989, p. 432).

2—Non-communicative Conduct: Those who opposed amending the U.S. Constitution to protect the flag specifically focused on the perceived threats to free speech; in other words, they objected to interrupting the communication process. They defined the issue as strictly legal, as outlined by Justice Brennan and testimony from constitutional scholars such as Cass Sunstein of the University of Chicago School of Law and Dean Gene Nichol of the University of Colorado Law School. Opponents said that if the flag debate did rest upon any symbol, it was the international perception of America as the symbol of freedom. Prohibiting the transmission and reception of expression such as flag burning would deeply harm that perception.

Testifying before a Senate hearing, Assistant Attorney General Walter Dellinger said that everyone agreed that the flag

> symbolizes our nation, its history, its values. We love the flag because it symbolizes the United States; but we must love the Constitution even more, because the Constitution is not a symbol. It is the thing itself." (Proposing a Constitutional amendment, 1995, p. 17)

To Dellinger, "the thing itself" was the democratic process, the give-and-take of political discussion based in the freedom to transmit and receive information and ideas that impact the public—whatever their content, whatever their mode of transmission. Dellinger invoked a classic John Stuart Mill approach to open government based in "freedom of opinion, and freedom of the expression of opinion" (1936, p. 63). Senator Edward Kennedy (D-Massachusetts) captured the legal tradition of this marketplace of ideas concept when he said:

> If freedom means anything, it means that we must tolerate not just the views we approve, but views we oppose as well. That fundamental principle is what gives America its true strength and permits our flag to fly high. (Proposing a Constitutional amendment, 1995, p. 3)

Senate Judiciary Committee Chair Orrin Hatch answered his opponents by clarifying the legal premises of flag protection supporters, based on Justice Stevens' dissent and testimony from First Amendment scholars such as Stephen B. Presser of Northwestern and Harvard's Richard Parker. Said Hatch:

> I believe the Court's majority had it wrong. Burning the flag is conduct—conduct for which there exists [sic] numerous peaceful alternatives—and may be prohibited. (Cong. Rec., 1998, p. S395)

Two years later Senator Hatch became more emphatic:

> The Supreme Court, in its infinite wisdom, has indicated that flag burning, defecating on the flag, or urinating on the flag is a form of speech. I don't see how anybody in his right mind can conclude that. There is no question that is offensive conduct and it ought to be stamped out. (Cong. Rec., 2000, p. S1769)

Senator Hatch established two additional legal points. First, "while traditional First Amendment jurisprudence would protect Johnson's ability to speak and write about the flag, it did not protect his ability to physically destroy the flag" (Cong. Rec., 1999, p. S2865). "The flag amendment is not about flag burners," wrote Hatch. "Its purpose is to correct the mistaken view that flag burning is speech" (2001). He continued that it "is time for us to make unequivocally clear that certain behavior in this country is and should be recognized as wrong and punishable by law" (Kapos, 2001, p. A1). Second, the "First Amendment's guarantee of freedom of speech has never been deemed absolute" (Proposing a Constitutional amendment, 1995, p. 5). Senator Hatch again emphasized physical conduct, even while comparing flag burning to acknowledged, if unprotected and immoral, speech:

> I believe that conduct such as flag burning, and other forms of physical desecration of our national symbol, is in the same category as obscenity and libel—outside the protection of the First Amendment and beyond the pale of acceptability even in a free society. (Hatch, 1995)

Senator John Ashcroft (R-Missouri) also called on the Stevens and Rehnquist dissents to add that the

> act of desecrating the flag does not have any content in and of itself. The act takes meaning and expresses conduct only in the context of the true speech which accompanies the act. And that speech remains unregulated. (Cong. Rec., 2000, p. S1766)

Drawing directly on Justice Rehnquist's exhortation "to legislate against conduct that is regarded as evil" (Johnson, 1989, p. 435), flag amendment proponents have continuously stressed that the American people made clear, via opinion polls and 49 state legislative resolutions supporting the amendment, that such immoral conduct should be prohibited. Communicative content was not an issue when William Detweiler, 1995 Commander of the American Legion, clarified this legislative and moral duty. He testified that desecration of the flag "is an evil act. Yet, as a wise man once observed, the only thing necessary for the triumph of evil is for good men to do nothing" (Proposing a Constitutional amendment, 1995, pp. 36-37).

In response to the conduct-not-speech argument, amendment opponent Senator Russell Feingold (D-Wisconsin) spoke directly to Justice Brennan's concern with content neutrality:

> This amendment departs from that noble and time-honored standard. It seeks instead to prohibit expression solely because of its content. Proponents of this amendment have made plain that they direct their effort at expression that they deem "disrespectful." Even more troubling is that this amendment leaves the determination of what is disrespectful to the government. (p. S1834)

Dellinger, Kennedy, and Feingold focused upon the communicative ability of symbols. By claiming that flag burning carried "content," they assumed that such symbolic content would be consumed by another person who could decode the message as political speech. In other words, they believed communication had occurred, that the flag burner had transmitted information, ideas, or emotions by the use of symbols. For Hatch, Ashcroft, Rehnquist, and Detweiler, however, if nonverbal symbols were evil acts they simply did not communicate; no message was transmitted in the purely physical act of igniting a flag. For flag protection proponents, Justice Brennan's concept of expressive conduct did not exist; expression and conduct were mutually exclusive.

3—Words Alone: But if communication did not occur, flag amendment opponents questioned what, in fact, offended those witnesses to Gregory Johnson's flag burning? Essentially, opponents believed Johnson's act produced a relationship by transmitting stimuli that evoked a particular response: offense. In other words, the witnesses decoded something, they just did not care for the message. Senator Ashcroft provided the pro-amendment answer above, when he said the act of desecrating a venerated object carries no content in and of itself, but that the "act takes meaning and expresses conduct only in the context of the true speech which accompanies the act" (Cong. Rec., 2000, p. S1766). For flag amendment proponents "true speech" uses words, whether spoken or written. Senator Hatch reified this position above, and after he reintroduced the Flag Protection Amendment to the Senate in April 2001. Building on Justice Stevens' suggestion that "an available, alternative mode of expression—including uttering words critical of the flag—be employed" (Texas v. Johnson, 1989, p. 437), Hatch said:

> The proposed amendment would not affect anyone's ability to express any opinion whatsoever about the flag, the country, or the government's actions. People can express their views in public, in private, in newspapers, on the Internet, and through broadcast media. Lighting fire to the flag adds nothing whatsoever to any debate about our nation's policies, priorities or direction. (Hatch, 2001)

In an earlier editorial, Senator Hatch exemplified communication only through the use of language:

> by holding demonstrations and rallies, walking picket lines, giving speeches, using bullhorns, carrying placards, distributing leaflets, writing letters to the editor, making calls to radio talk shows, sending petitions to public officials, filing lawsuits, transmitting computer messages on the information super highway, and so forth. (Hatch, 1995)

Hatch wrote that "[p]rohibiting burning and similar physical desecration of one unique symbol, our flag, will not prevent a single idea or thought from being expressed" (1995).

By defining "true speech" as solely spoken or written, Ashcroft and Hatch ignored the nature of words as themselves symbolic artifacts selected to convey certain meanings, perhaps with political intent. For words are only part of the communicative message: nonverbal codes, including artifacts like flags and their use, usually convey even more meaning to an audience (Burgoon, 1985, pp. 349-350). But by ignoring even the symbolic nature of words, proponents need not raise the specter of other symbolic communicative elements. Acknowledging nonverbal codes such as flag burning would admit to the existence of message creation, transmission, and reception, which would engage Justice Brennan's concern with content neutrality. Flag amendment proponents, therefore, cannot allow the presence of communication.

Conclusion

Texas v. Johnson established, by the debatable 5-4 margin, that burning an American flag is indeed a communicative act and thus protected expressive conduct. But within the flag burning controversy, the communication process itself has become a political tool. Flag protection proponents argue that such conduct does not create or transmit a message to a receiver. They define flag burning—if in any way symbolic—as symbolic behavior that is immoral, an "evil act," which promotes the idea that such conduct should be subject to social control through the law. Kent Greenawalt (1989), who adapted linguistic speech act theory to legal theory, supported this argument when he defined categories of speech that do not qualify for First Amendment protection because they "are ways of doing things, not of asserting things" and thus "subject to regulation on the same bases as most noncommunicative behavior…outside the scope of a principle of free speech" (p. 58).

Yet, this position provides the rather confusing possibility of a person believing she understood and received a particular message, only to be told by the government that no message existed. And, since no message existed, her believed communication could not be protected speech under the First Amendment and was not allowed in society. Such a scenario demonstrates both the vital role the communication process plays in the law-making process and the ensuing societal implications. For what proponents "would restrict are the symbolic elements themselves—the ideas and meanings contained in the words, pictures, or representations in question—for it is these elements, or more accurately their consequences, that create the problems they seek to address" (Haiman, 1993, p. 4).

Flag protection proponents want to address the decay of moral patriotism in the United States. One way they seek to combat that decay is to suppress ideas they deem unacceptable, by denying that communication occurs. If passed, the Flag Protection Amendment would alter the parameters of free speech in our country. This is as it should be, said flag protection advocate Senator Strom Thurmond (R-South Carolina):

> Why should society let even one person wrap themselves [sic] around some absolute interpretation of the First Amendment to protect indefensible speech? Have we focused so much on the rights of the individual that we have forgotten the rights of the people? (Cong. Rec., 1998, p. S400)

The proposed constitutional amendment can thus remove not only First Amendment protection for symbolic expression, but also remove the individual citizen's legal ability to discern for him/herself whether communication even occurred. In other words, by altering our legal definition of communication to favor the community over the individual, the Flag Protection Amendment will alter our democracy's balance between citizen autonomy and social order.

Notes

[i] Tedford (1985, pp. 53-68) provides a clear analysis of the Supreme Court's "bad tendency" test for speech prior to 1957.

[ii] While a constitutional amendment is the primary focus in Congress, several senators have promoted federal statutes in 1999 and 2000: e.g., Amendment No. 2889, 146 Cong. Rec. S1706 (2000).

[iii] See Goldstein (1996) for a summary of congressional debate and hearings through 1995. The debate has not changed into 2001.

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Redefining *Internet Service Providers:*

Towards a New Legal Framework for Internet Regulation

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Redefining *Internet Service Providers:*

Towards a New Legal Framework for Internet Regulation

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Abstract

This paper explores the legal status of ISPs with the question of whether we have one legal definition, agreed to by the FCC, the courts, and Congress, that is consistent with what ISPs do today. This study found out that the courts' interpretations of section 230 of the Communication Decency Act are consistent. In reviewing the recent cases, the study found out that the section 230 immunity for liability in third party posting now expands, generally covering all civil liability claims originating from third-party content. In addition, it appears that the reach of section 230's immunity extends not only to the traditional ISPs such as AOL and Prodigy, but also to a variety of interactive computer service providers such as Amazon.com and eBay.com.

In considering a legal framework for Internet regulation, the court might need to recognize that the ISPs have added a variety of editorial functions that were unavailable when Congress enacted the CDA.

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I. Introduction

One of the most salient issues arising from the rapid development of the Internet is the liability of Internet Service Providers ("ISPs")[1] for distributing content created by third parties. Due to the anonymous nature of the Internet, it is hard to discover the author of any defamatory material. This unique characteristic of Internet communication raised the question of whether an ISP should be held liable for the material it distributes.

ISPs have relied on the federal statutory immunity created by section 230 of the Communication Decency Act ("CDA"),[2] enacted as part of the Telecommunications Act of 1996. Section 230, as interpreted by courts over the last six years, provides an ISP with broad immunity from liability for harms arising from third-party content that is made available through the ISP's services.

For the last several years, the courts have grappled with how the common law liability standards apply to ISPs, particularly as ISPs republish user postings on message board services.[3] Even after the enactment of section 230 of the CDA, there are conflicting arguments and questions about the scope and limit of statutory immunity of ISPs as well as the legal status of those providers. In fact, ISPs have added various services since the Telecommunications Act was enacted in 1996. While the term ISP was once used primarily for a company that provided Internet access like a telephone company, now ISPs also provide their own content. In this regard, ISPs today are unique in the ways they can act as both publishers and distributors of content.

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[1] An ISP is a company that provides their subscribers with Internet access in exchange of a monthly fee. For further discussion, *see infra* part II A. [hereinafter ISP].

[2] 47 U.S.C. § 230 (1996) "Protection for Private Blocking and Screening of Offensive Material" provides in relevant part:
(c) Protection for "Good Samaritan" blocking and screening of offensive material
(1) Treatment of publisher or speaker
No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
(2) Civil liability
No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene…

[3] Jonathan A. Friedman & Francis M. Buono, *Limiting Tort Liability for Online Third-party Content Under Section 230 of the Communications Act*, 52 FED. COMM. L. J. 647, 651 (2000).

Thus, the author proposes that the present is the time to ask whether we have one legal definition of an ISP, that is agreed to by the FCC, the courts, and Congress, and that is consistent with what ISPs do today. In reviewing the recent cases, it is especially noteworthy that the section 230's immunity has expanded, generally covering all civil liability claims originating from third-party content - not only defamation but also copyright infringement[4] and contractual claims. Therefore, the purpose of this paper is to explore the legal status of ISPs, which is demonstrated in the court opinions that have interpreted section 230. This study further attempts to examine whether section 230 of the CDA provides appropriate provisions to understand a variety of roles ISPs play today. This paper also examines what issues should be considered to reconstruct a regulatory scheme for the Internet communication.

Literature Review

There are several law review articles that deal with online defamation with regard to the courts' interpretations of the section 230 of the CDA. Most of the literature is commenting the court opinions such as *Kenneth Zeran v. America Online,* Inc.[5], *Blumenthal v. Drudge,*[6] and *Lunney v. Prodigy.*[7] Scholars appear to be divided into the two groups in terms of their argument about these court decisions and interpretations of section 230 immunity. On the one hand, large groups of scholars have criticized the leading case *Zeran* as broad holding, claiming that *Zeran* provides ISPs with greater immunity than originally intended by Congress.[8] First, critics point to the plain language and legislative history of section 230 to support the view that Congress enacted section 230 to immunize ISPs only from publisher, not distributor, liability.[9] They note, for example, that section 230 expressly refers to the treatment of an ISP as a publisher or speaker of third-party content; there is, in contrast, no mention of the ISP as a distributor.[10]

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[4] *See* Stoner v. eBay, 56 U.S.P.Q. 2d. 1852 (Cal. Super. Ct. 2000) and *supra* discussion part V: *But see generally* Digital Millenium Copyright Act of 1998 (17 U.S.C. § 512) to understand how the law protects ISPs from liability for monetary damages for copyright infringement when the ISPs merely transmit or temporarily store digital information for their subscribers.

Finally, critics contend that *Zeran* does not serve the central public policy goal of section 230 - namely that ISPs should be encouraged to police their sites for offensive content. According to this view, immunizing an ISP from all liability for third-party content, even where the ISP is advised of the defamatory nature of such content but fails to remove it expeditiously or at all, would create a disincentive for any ISP to police its service for offensive content.[11]

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[5] 129 F. 3d 327 (4th Cir. 1997).

[6] 922 F. Supp. 44 (D.D.C. 1998).

[7] 723 N.E.2d 539 (N.Y. 1999).

[8] *See, e.g.,* Ian Ballon, *Zeran v. AOL: Why the Fourth Circuit Is Wrong*, J. Internet L., Mar. 1998, at 6; David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet,* 61 Alb. L. Rev. 147 (1997) (discussing the district court decision but addressing issues also raised by the Fourth Circuit); David Wiener, *Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After Zeran?*, 39 Santa Clara L. Rev. 905 *(1999);* Steven M. Cordero, Comment, Damnum Absque Injuria: *Zeran v. AOL and Cyberspace Defamation Law*, 9 Fordham Intell. Prop. Media & Ent. L.J. 775 (1999).

[9] *See, e.g.*, Cordero, *supra* note 8, at 796; Sheridan, *supra* note 8, at 168. For further discussion of publisher/distributor liability, *see infra* part II.B.

[10] *Id.*

On the other hand, some scholars argue that the section 230 works and should not be narrowed.[12] These current literature only deal with the section 230 with regard to online defamation. They do not discuss the legal status of the ISPs in terms of their varying roles and functions, and therefore do not address the public policy issues regarding regulation of ISPs, one of the most important entities in cyberlaw. In addition, no article deals with the recent cases such as *Jane Doe v. America Online, Inc.*[13] and *Jerome Scheider v. Amazon.com, Inc.*[14] This study addresses these issues focused on the recent cases.

Research Questions and Method

The research questions of this study are as follows:

First, are the court interpretations of section 230 consistent?

Second, what would be the implication of the recent cases such as *Jane Doe v. America Online, Inc.*[15] and *Jerome Scheider v. Amazon.com, Inc.*[16]?; What standards are used to determine what service providers qualify as s subject to section 230 immunity?

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[11] *See, e.g.*, Sheridan, *supra* note 8, at 169; Ballon, *supra* note 8, at 11-12 ("If, however, services and users were immune from any liability for third party acts of defamation they would have no legal incentive to respond to customer complaints or monitor their domains."). Critics have generally urged a more restrictive reading of section 230, unless and until Congress acts to clarify that section 230 immunity extends to distributor liability. *See, e.g.*, Wiener, *supra* note 8, at 939; Sheridan, *supra* note 8, at 178.

[12] *See. e.g.*, Friedman & Buono, *supra* note 3, at 652-55 (2000).

[13] 783 So. 2d. 1010 (Fla. 2001) [hereinafter *AOL*].

[14] 31 P.3d 37 (Wash. Ct. App. 2001) [hereinafter *Amazon*].

[15] 783 So. 2d. 1010 (Fla. 2001).

[16] 31 P.3d 37 (Wash. Ct. App. 2001).

To answer the questions, this study used primary legal authorities such as cases, statutes, the Congressional Record, and the FCC Records. Part II of this paper discusses the definitions of an ISP. Part III deals with the legislative history and the issues of section 230, and examines whether court interpretations of section 230 are consistent. *AOL* and *Amazon* are then analyzed in Part IV, and Part V discusses the implications of the cases. This paper concludes that, in considering a legal framework for Internet regulation, one should note the varying functional roles of ISPs.

II. Legal Status of Internet Service Provider

A. Internet Service Provider

As defined in the Telecommunications Act of 1996, the term "Internet" means the international computer network of both federal and non-federal interoperable packet switched data networks.[17] An "Internet Service Provider," which provides Internet access for individuals, acts as a conduit for individuals to dial in before getting patched through to the Internet backbone.[18] While those providers in the past simply connected the user directly with the Internet, now they provide their own online content and services including e-mail, file transfer, news, bulletin board, chat rooms and space for personal homepages.[19] The term "ISP" in this paper refers to the companies, such as America Online and Prodigy, that provide their subscribers with their own online contents as well as Internet access.

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[17] 47 U.S.C. § 230 (f)(1) (1996).

[18] PRESTON GRALLA, HOW THE INTERNET WORKS 21 (4th ed. 1998).

Under the statutory definition, ISPs are recognized as providers of "Interactive Computer Service." Interactive computer service means "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[20] The court has noted that Internet access providers are a subclass of the broader definition of interactive computer service providers.[21]

The function of an ISP involves the transmission of information between points specified by the user without change in the form or content of the information as sent and received.[22] This function raises the question of whether ISPs can be treated as a telecommunications carrier, which is defined as a provider of telecommunications services such as a telephone company.[23] In light of regulatory model, telecommunications carriers are treated under the common carrier model.[24] Common carriers, such as local and long distance telephone companies have been required to serve all paying customers in a government-sanctioned monopoly. Common carriers transmit the messages of anyone who pays for the service, without interfering in the content.[25]

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[19] AUGUST E. GRANT & JENNIFER HARMAN MEADOWS, COMMUNICATION TECHNOLOGY UPDATE 118 (6th ed. 1998).

[20] 47 U.S.C. § 230 (f)(2) (1996).

[21] *Amazon*, 31 P.3d at 40.

[22] Walt Sapronov & Lewis E. Lamb III, *Information and Enhanced Services: A RestrISPective of Regulated and Unregulated Services and an Examination of Their Treatment after the Telecommunications Act of 1996, in* TELECOMMUNICATIONS LAW, REGULATION, AND POLICY 262 (Walter Saprounou & William H. Read eds.,1998).

[23] 47 U.S.C. § 251(a)-(c). "any provider of telecommunications services, except that …", "a provider of telecommunications services may be classified as a telecommunications carrier, a local exchange carrier, or an incumbent local exchange carrier…"

However, as a matter of statutory interpretation, ISPs do not fall within the definition of telecommunications carriers in the Telecommunications Act.[26] The FCC has also declared that common carriers do not include ISPs.[27]

Given the kinds of services ISPs are providing, defamatory statements are transmitted by ISPs in various manners. For example, a statement may be posted on a bulletin board, made in a "chat" discussion or sent via an e-mail service provided by the ISP. ISPs can be sued for defamation, when the defamatory statement is authored by third-party, and subsequently transmitted through the ISP. The litigation involving defamation claim against ISPs has required the court to decide how the common law standard of liability for third party postings is applied to the Internet.[28]

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[24] 47 U.S.C. § 153. "a telecommunications carrier shall be treated as common carrier under this Act…"; *See generally* HENK BRANDS & EVAN T. LEO, THE LAW AND REGULATION OF TELECOMMUNICATIONS CARRIERS (1999).

[25] KENT R. MIDDLETON, ROBERT TRAGER & BILL F. CHAMBERLIN, THE LAW OF PUBLIC COMMUNICATION 565 (5th ed. 2002).

[26] Congress provided, in 47 U.S.C. § 230(e)(6), that "nothing in this section shall be construed to treat interactive computer services as common carriers." *See also* Joint Explanatory Statement of the Committee of Conference, 142 CONG. REC. H1078, 1197 (1996).

[27] *In re Non-Accounting Safeguards*, 11 FCC Rec. 21905, 22034 (1996); *See also In re Federal-State Joint Board on Universal Service*, 12 FCC Rec. 87, 479 (1996) (noting that the Commission has traditionally defined on-line and Internet services as enhanced (or information) services and has not regulated as common carriers).

[28] The cases involving section 230 claims are: *Kenneth Zeran v. America Online,* Inc.,129 F. 3d 327 (4th Cir. 1997); *Blumenthal v. Drudge*, 922 F. Supp. 44 (D.D.C. 1998); *Lunney v. Prodigy*, 723 N.E.2d 539 (N.Y. 1999); *Ben Ezra, Weinstein, and Co. Inc. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000); *Stoner v. eBay*, 56 U.S.P.Q. 2d 1852 (Cal. Super. Ct. 2000); *Jane Doe v. America Online, Inc.*, 783 So. 2d

B. Common Law Liability Standard for ISPs in Third-Party Postings

Defamation claims have been premised on publication of allegedly defamatory statement by third parties. Under the "republication rule," one who repeats a defamatory statement may be held as liable as the original defamer.[29] Courts have distinguished among entities that publish or republish a defamatory statement; publishers, distributors, and common carriers. This distinction is critical to understand the ISP's role and to interpret section 230 in order to decide whether the ISPs are protected from the legal claim under these liability standards.

First, publication is integral to defamation liability.[30] Traditional examples of "publishers" include newspapers, magazines, and broadcasters. Today, any person or organization with a computer connected to the Internet can "publish" information.[31] When they create the content of their publications, they may be held accountable for the content. For example, a person libeled in an Internet bulletin board can sue the author and the system operator, if the operator controls the bulletin board like a publisher.[32]

Second, the "distributors," who deliver or transmit such material, include bookstores, libraries, and newsstands, and generally are deemed liable for defamatory

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1010 (Fla. 2001); *Patentwizard v. Kinko's*, 2001 U.S. Dist. LEXIS 15675 (DSD 2001); *Jerome Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. Ct. App. 2001).

[29] *See e.g.* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 799 (5th ed. 1984); MADELEINE SCHACHTER, LAW OF INTERNET SPEECH 197 (2001).

[30] Restatement (Second) of Torts, 588 (1977).

[31] Reno v. ACLU, 521 U.S. 844, 853 (1997) [hereinafter *Reno*].

[32] MIDDLETON, TRAGER & CHAMBERLIN, *supra* note 25, at 96 (5th ed. 2002); *See also* Stratton Oakmont v. Prodigy, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995) (concluding Prodigy is liable for the defamatory statement on its bulletin board, since Prodigy exercised sufficient editorial control over its bulletin board to render it a publisher with the same responsibilities as a newspaper).

statements contained in the materials they distribute, only if they knew or had reason to know that the material was defamatory.[33] In *Cubby v. CompuServe*,[34] the court concluded that CompuServe's service was in essence an electronic, for-profit library that carries a vast number of publications, and, consequently, CompuServe must be considered a "distributor" for purposes of assessing the plaintiff's claim.[35] The court then determined that CompuServe was not liable because it did not know or have reason to know of the content of the online newsletter.[36]

Third, "common carriers," such as telephone companies, simply carry the message of others. These entities are not held liable for the dissemination of defamatory material unless they are shown to have participated in the preparation of its content.[37]

The unique nature of the Internet raises uncertainty about applying the common law standard to ISPs.[38] An ISP does not create defamatory statements, but merely acts as a conduit for the statements of its subscribers.[39] Because ISPs are not traditional publishers, there may be confusion as to their potential liability for publishing defamatory material. Moreover, defamatory statements are often published anonymously on the Internet.[40] Thus, applying traditional libel standards to ISPs is problematic.[41] The courts have relied on statutory language of section 230 and its legislative history to decide whether ISPs are liable for defamatory statement authored by third party.

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[33] *See* KEETON et al, *supra* note 29, at 803; *see also* Restatement (Second) of Torts, 581, 612 (1977).

[34] Cubby, Inc. v. CompuServe Inc., 776 F.Supp. 135, 139 (S.D.N.Y. 1991) (citing Lerman v. Chuckleberry, 521 F. Supp. 228, 235 (S.D.N.Y. 1981)).

[35] *Id.* at 141.

[36] *Id.*

[37] SCHACHTER, *supra* note 29, at 197; *See also* Lunney v. Prodigy, 723 N.E. 2d 539 (N.Y. 1999) (holding that Prodigy was not liable for a defamation claim, since it merely acted as a passive conduit like a telephone company).

[38] KENNETH C. CREECH, ELECTRONIC MEDIA LAW AND REGULATION 317 (2000).

[39] Lilian Edwards, *Defamation and the Internet: Name-calling in Cyberspace*, in LAW AND THE INTERNET 183 (Lilian Edwards & Charlotte Waelde eds., 1997).

[40] *Id.*

III. Section 230 of the Communications Decency Act

A. Background

In enacting the CDA as part of the Telecommunications Act of 1996, Congress intended to "remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material."[42] On February 8, 1996, President Clinton signed the Telecommunications Act of 1996 into law.[43] One section of the CDA imposed criminal penalties for "knowingly" transmitting "indecent" or "patently offensive" material to minors by means of a telecommunications device.[44] The Act established a defense to liability for a person that "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors ... to [an indecent] communication."[45]

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[41] *Id.*

[42] *See* the "Policy" section of the Act, 47 U.S.C. 230(b)(4) (1996).

[43] 47 U.S.C.A. 101-710.

[44] 47 U.S.C. 223(a)(1)(2) (1996) ("whoever - (1) in interstate or foreign communications - (A) by means of a telecommunications device knowingly - (i) makes ... and (ii) initiates the transmission of ... any ... communication which is obscene ... or indecent, ... (B) ... knowing that the recipient of the communication is under 18 years of age" shall be fined or imprisoned, or both.).

[45] 47 U.S.C. 223(e)(5)(A) (1996).

In *Reno,*[46] the U.S. Supreme Court declared the indecency provisions of the Act unconstitutional and enjoined their enforcement. The *Reno* Court's decision was limited to section 223(a) and 223(d) of the Act, and did not affect the "Good Samaritan Provision" of section 230(c)(1), which states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." This provision prevents an ISP from being treated as a publisher of content that it transmits but does not create.[47] In enacting this section, Congress recognized that an ISP's efforts to avoid liability under the Act, by making good faith efforts to screen indecent matter, would subject it to strict liability for defamation under *Stratton Oakmont v. Prodigy.*[48] In *Stratton,* the court recognized Prodigy as publisher and held it liable for allegedly defamatory statements made about the plaintiff by an unidentified user of Prodigy's bulletin board.[49]

Thus, Congress specifically included this section "to overrule *Stratton* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material."[50]

B. Interpreting Section 230 of the CDA

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[46] 521 U.S. 844 (1997).

[47] Keith Siver, *Good Samaritans in Cyberspace,* 23 RUTGERS COMPUTER & TECH. L. J. 1, 21 (1997).

[48] 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995).

[49] *Id.* (deciding that Prodigy exercised sufficient editorial control over its computer bulletin boards as a publisher).

[50] S. CONF. REP. No. 104-230, at 435 (1996).

The courts have been asked to interpret the section 230 of the CDA since its enactment. *Kenneth Zeran v. America Online, Inc.*[51] is the leading case among those involving section 230 claims. In April 1996, Kenneth Zeran filed a suit against America Online ("AOL")[52] alleging negligence due to the unreasonable delay in the removal of defamatory material posted on an AOL bulletin board by an unidentified third party.[53] Upon learning of the defamatory statement, Zeran contacted AOL and was informed that the posting would be removed.[54] Zeran argued that AOL should be held liable as a distributor because it knew the material was defamatory. Moreover, Zeran argued that the CDA only exempted ISPs from publisher liability, but that distributor liability was left intact by the CDA.

The United States Court of Appeals for the Fourth Circuit concluded, section 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.[55] The court rejected a claim that the section 230 immunity eliminated only publisher liability, leaving distributor liability intact and the defendant liable thereunder.[56] The court reasoned that the defendant had to be treated as a publisher under the statute and was thus immune from liability.[57] The court explained that if IPSs were subject to distributor liability they would face potential liability each time they received notice of a potentially defamatory statement--from any party, concerning any message.[58] Although this might be feasible for the traditional print publisher, the court admitted, the sheer number of postings on IPSs would create an impossible burden in the Internet context.[59] To leave distributor liability in effect would defeat the primary purposes of the statute and would certainly lessen the scope plainly intended by Congress' use of the term "publisher," the court determined.[60]

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[51] 129 F.3d 327 (4th Cir. 1997) [hereinafter *Zeran*].

[52] [hereinafter AOL]

[53] *Id.* at 328.

[54] *Id.* The parties dispute the date AOL removed the original posting.

[55] *Id.* at 332.

[56] *Id.*

[57] *Id.*

In interpreting section 230, other courts have relied on the Fourth Circuit's ruling since *Zeran*. This study found that all of the decisions in libel cases[61] involving ISPs since *Zeran* immunized ISPs from civil liability, relying on section 230. That means, in a series of decisions since the enactment of the CDA, the courts have interpreted section 230 to bar virtually all liability of ISPs for providing access to defamatory information created by third parties.[62]

Despite the consistent decisions that held ISPs were not liable for defamation claims under section 230, the reasoning was somewhat different from case to case.[63] There are controversies over the courts' interpretation of section 230.

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[58] *Id.* at 333.

[59] *Id.*

[60] *Id.* at 334.

[61] *Kenneth Zeran v. America Online,* Inc.,129 F. 3d 327 (4th Cir. 1997); *Blumenthal v. Drudge*, 922 F. Supp. 44 (D.D.C. 1998); *Lunney v. Prodigy*, 723 N.E.2d 539 (N.Y. 1999); *Ben Ezra, Weinstein, and Co. Inc. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000); *Stoner v. eBay,* 56 U.S.P.Q. 2d 1852 (Cal. Super. Ct. 2000); *Jane Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001); *Patentwizard v. Kinko's*, 2001 U.S. Dist. LEXIS 15675 (DSD 2001); *Jerome Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. Ct. App. 2001).

[62] Christopher Butler, *Plotting the Return of an Ancient Tort to Cyberspace: Towards a New Federal Standard of Responsibility for Defamation for Internet Service Providers*, 6 MICH. TELECOMM. TECH. L. REV.247, 248 (2000).

C. Controversial Issues in Section 230

Legal commentators have questioned whether Congress has left ISPs open to distributor liability, since section 230 did not discuss distributor liability, whereas it specifically immunized the providers from publisher liability. This question is related to the argument that section 230 provides ISPs with broader immunity than Congress originally intended.[64] For example, a legal commentator argues that the deliberate omission of the word "distributor" means that Congress did not intend to absolve ISPs from all liability.[65] Another commentator also suggested that Congress should amend the CDA so that the ISPs may be found liable as "distributors" when they fail to remove defamatory content of which they are aware.[66] He argues that Congress' clear intent was to protect and encourage the actions of ISPs that take active steps to monitor and remove objectionable content, not to protect them from liability when they knowingly choose not to remove objectionable content.[67]

There is a commentary that argues *Zeran* demonstrates an unfortunate side effect of a law that was drafted more broadly than it needed to be to achieve its intended

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[63] For instance, *Lunney* court analyzed Prodigy under the common carrier framework, whereas the others focused on the ISP's role as a publisher or a distributor. *See supra* part II B.

[64] *e.g. Michael H. Spencer, Defamatory E-Mail and Employer Liability: Why Razing Zeran v. America OnlineIs a Good Thing*, 6 RICH. J.L. & TECH. 25, 29-32 (2000) (criticizing as erroneous *Zeran*'s interpretation of the CDA eliminating ISP distributor liability); Sarah B. Boehm, *A Brave New World of Free Speech: Should Interactive Computer Service Providers Be Held Liable for the Material They Disseminate?* 5 RICH. J.L. & TECH. 7, 24 (1998) (arguing that the court overlooked the possibility of invoking vicarious liability in *Blumenthal v. Drudge*); Keith Siver, *Good Samaritans in Cyberspace*, 23 RUTGERS COMPUTER & TECH. L. J. 1, 45 (1997) (arguing that by protecting ISPs who restrict or screen objectionable materials from liability as publishers, the CDA will not achieve its intended result).

[65] Spencer, *supra* note 64, at 34.

[66] Butler, *supra* note 62, at 249. He argues that the "Good Samaritan" protections from civil liability were intended to aid only those ISPs who took "actions to restrict or to enable restriction of access to objectionable online material (citing S. Conf. Rep. No. 104-230, at 435 (1996)).

purpose.[68] Another commentary notes that, due to the Internet's ability to provide anonymity to some participants, the current standard leaves little remedy to those individuals who's reputations have been damaged through the use of Internet communication.[69]

Given all the criticism since *Zeran*, it would be noteworthy whether the courts, in recent case, have recognized the possible problems these commentators addressed.

IV. Analysis of the Cases

Doe v. AOL, and *Schneider v. Amazon* are the two most recent cases where the court have interpreted section 230.[70] Both of the cases were decided in 2001, and have commonality in the causes of action and the plaintiffs' claims. In both cases, the plaintiffs sued AOL and Amzon.com for negligence and breach of the duty, in that the defendants had actual knowledge of defamatory material in their web sites.[71]

The Florida Supreme Court case *AOL* is noteworthy, since the dissent in this case is the first judicial recognition that addresses the issues discussed by commentators in above part, assuming a distributor liability of AOL.

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[67] *Id.* at 252.

[68] Mitchell P. Goldstein, *Service Provider Liability for Acts Committed By Users: What You Don't Know Can Hurt You*, 18 J. MARSHALL J. COMPUTER & INFO. L. 591, 634 (2000).

[69] Butler, *see supra* note 62, at 271 (proposing a federal standard imposing some liability for ISPs).

[70] Patentwizard, Inc. v. Kinko's Inc., 163 F. Supp. 2d 1069 (DSD 2001) is another 2001 case. However, *Kinko's* is not discussed in part IV, since Kinko's, a commercial copy shop that rents the use of the Internet-accessible computers to customers is beyond the focus of this paper. That means, Kinko's, a provider of an Internet-accessible computer, does not have its own online content as "ISPs" in this paper do.

A. *Jane Doe v. America Online, Inc.*

Jane Doe sued AOL and Russell, a user of AOL, for negligence, claiming that Russell had used the AOL's chat rooms to market obscene photographs and videotapes of her minor son.[72] Doe claimed that AOL violated criminal statutes, section 847.011[73] and section 847.0135(2) [74] of the Florida Statutes. Doe alleged that AOL was negligent per se in violating Florida Statutes, by allowing Russell to distribute an advertisement offering child pornography including obscene images of the son.[75]

Doe asserted a separate claim for negligence based on the allegation that AOL knew or should have known that Russell used the service to market and distribute child pornography; that it should have used reasonable care in its operation; that it breached its duty.[76] Doe further claimed that complaints had been communicated to AOL as to Russell's transmitting obscene and unlawful photographs or images.[77] She pointed out that, although AOL reserved the right to terminate without notice the service of any member who did not abide by its "Terms of Service and Rules of the Road," AOL neither

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[71] *See infra* part A & B.

[72] 783 So. 2d at 1011.

[73] FLA. STAT. § 847.011(1)(a) (1993) provides in relevant part: Any person who knowingly ... distributes ... or offers to sell ... any obscene ... photograph ... [or] image ... is guilty of a misdemeanor of the first degree ....

[74] FLA. STAT. § 847.0135(2) (1993). Computer Pornography and Child Exploitation Prevention Act of 1986 provides in relevant part: Computer Pornography.--A person is guilty of a violation of this section if he knowingly ... transmits by means of computer, or makes, prints, publishes, or reproduces ...sexual conduct of or with any minor, or the visual depiction of such conduct...

[75] *AOL*, 783 So. 2d at 1011.

[76] *Id.* at 1012.

[77] *Id.*

warned Russell to stop nor suspended his service.[78] Likewise, Doe argued that section 230 of the CDA should not apply to her case because AOL had a distributor liability, since it had knowledge of the obscene materials transmitted on its services.

AOL moved to dismiss Doe's complaint and argued that her claims were barred by section 230 of the CDA, which prohibits civil actions that treat an interactive computer service as the "publisher or speaker" of messages transmitted over its service by third parties.[79]

Majority Opinion

The appeals court certified to the Florida Supreme Court the question of whether an ISP with notice of a defamatory third party posting is entitled to immunity under section 230 of the CDA.[80] The majority opinion, decided by a 4-3 vote,[81] affirmed the lower court's decision to dismiss Doe's claims,[82] and held AOL was clearly protected by section 230's immunity.[83]

The court rejected Doe's argument that distributor liability, which is a liability for knowingly or negligently distributing defamatory material, is different from publisher liability, a liability for publishing defamatory material.[84] Relying on *Zeran*,[85] which held AOL immune from liability with regard to material posted on an AOL online bulletin board, the court said distributor liability is merely a subset of publisher liability. The court also relied on Restatement (Second) of Torts section 577, which involves the definition of "publication" of defamatory material.[86] Based on this section, the court decided publisher was not merely one who intentionally communicates defamatory information.[87] Instead, the court said, the law also treated as a publisher or speaker one who failed to take reasonable steps to remove defamatory statements from property under her control.[88]

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[78] *Id.*

[79] *Id.* at 1012-13.

[80] *Id.* at 1011.

[81] The majority includes justice Wells, justice Shaw, justice Harding and justice Anstead. Justice Lewis dissented with an opinion, in which justice Pariente and justice Quince concurred. *Id.* at 1010.

[82] *See* 718 So. 2d 385 (Fla. Dist. Ct. App. 1998).

[83] *AOL*, 783 So. 2d at 1017.

[84] *Id.* at 1016.

The court also held that the federal Communications Decency Act pre-empted Florida law for negligence suit against an ISP as a distributor of information allegedly in violation of Florida criminal statutes prohibiting the distribution of obscene literature and computer pornography.[89]

The court further stated that section 230 reflected Congress' intent to apply the CDA to all suits filed after its enactment, notwithstanding when the operative facts arose.[90] Thus, the court concluded that the CDA provided that no cause of action might be brought and no liability might be imposed under any State or local law that is inconsistent with this section.[91]

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[85] *Zeran*, 129 F.3d at 331-334.

[86] Restatement (Second) of Torts, 577 (1977), definition of "publication" of defamatory material states: (1) Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed. (2) One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.

[87] *AOL*, 783 So. 2d at 1017.

[88] *Id.*

[89] *Id.*

[90] *Id.*

The Dissenting Opinion

Justice Lewis dissented with an opinion, in which justice Pariente and justice Quince concurred, and said that AOL should be held liable as a distributor. The justice said, contrary to the majority's view, the statute did not reflect an intent to totally exonerate an ISP from responsibility where an ISP allegedly had acted as a knowing distributor of material leading to the sale of child pornography.[92] He pointed out that, after having been given actual notice of the particular activity, AOL took absolutely no steps to curtail continued dissemination of the information by its specifically identified customer, when it had the right and power to do so.[93]

The dissent reasoned that the majority view ignored the common law underpinnings of the present controversy, and failed to accommodate the traditional distinction between publishers and distributors consistently recognized in American jurisprudence. The dissent also reasoned that the majority view excluded proper analysis of the careful wording of the subject legislation, and did not consider the obvious intent additionally underscored by Congress both in the stated policies underlying the statute, and in the statute's legislative history.[94]

Justice Lewis stated that, contrary to common law which has traditionally recognized an important difference between distributor and publisher liability, the majority opinion rejected any such distinction, relying on the Restatement (Second) of Torts section 577 for the proposition that "the law treats as a publisher or speaker one who fails to take reasonable steps to remove defamatory statements from property under

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[91] *Id.* at 1018.

[92] *Id.* at 1019.

[93] *Id.*

her control."[95] According to him, distributor liability that the Court should have addressed is defined not in section 577, but in section 581(1) of Restatement.[96] The dissent noted that it was section 581(1), which appeared more applicable to AOL's activities at issue, since it involved those who "only deliver or transmit defamation published by a third person."[97] Then the dissent contented that under the more appropriate section of the Restatement (Second) of Torts, AOL--not as a publisher, but as a distributor ("one who only delivers or transmits defamatory matter published by a third person")--would have potential liability where it was alleged that AOL actually knew of the illicit character of the material which it was transmitting over its Internet service.[98]

The dissent stated that, in *Zeran* and the majority view, the statement that an ISP shall not be treated as a "publisher or speaker" of third-party information[99] had been interpreted to mean not only that an ISP could never be subject to liability for negligence as a "publisher," but also that an ISP could never be subject to liability based upon its own patently irresponsible role as a distributor who has allegedly been given actual

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[94] *Id.*

[95] *Id.* at 1021-22 (stating "While the general common law tort principles contained in the Restatement are still viable, the treatise has yet to incorporate the realities of the World Wide Web"). *See also* Restatement (Second) of Torts, 577 (1977).

[96] *Id.* at 1022.

[97] *Id.* (stating: § 581. Transmission of Defamation Published by Third Person
(1) Except as stated in subsection (2), one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character; (2) One who broadcasts defamatory matter by means of radio or television is subject to the same liability as an original publisher).

[98] *Id.* (quoting W. PAGE KEETON *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 810-11 (5th ed. 1984). "It would appear quite clearly that those who perform a secondary role in disseminating defamatory matter authored and published by others in the form of books, magazines and the like--as in the case of libraries, news vendors, distributors, and carriers--would not be subject to liability to anyone in the absence of proof that they knew or had reason to know of the existence of defamatory matter contained in matter published.").

notice of materials published on its service by a specified customer, yet has done absolutely nothing about it.[100]

B. *Jerome Schneider v. Amazon.com, Inc.*

In *Jerome Schneider v. Amazon.com Inc.*,[101] the Washington Court of Appeals held section 230 of CDA immunized the Internet book vendor Amazon.com from tort and contractual liability arising from allegedly libelous statements made by third parties in the book review section in its web site.

The plaintiff, Schneider, has written several books relating to taxation and asset protection. The books were sale at the web site of Amazon.com, where it offers Internet users the opportunity to post comments about the books made available on the its web site. Amazon.com·maintains a guideline that bars certain kinds of comments, and reserves the right to remove such posts from the Web page.[102]

Anonymous Amazon users posted comments critical of Schneider and his books. Responding to complaints from Schneider, Amazon agreed that some of the posts violated the guidelines and promised to remove the postings within one to two business days. However, the postings had not been removed after two days.[103] Schneider sued Amazon.com and anonymous users for defamation and tortious interference with a

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[99] 47 U.S.C. 230 (c)(1) (1996).

[100] *AOL*, 783 So. 2d at 1023.

[101] 31 P.3d 37 (Wash. Ct. App. 2001). Decided on Sep 17, 2001.

[102] *Id.* at 38.

[103] *Id.*

business expectancy.[104] Schneider later amended his complaints, deleting the defamation claim and alleging negligent misrepresentation, tortious interference, and breach of contract.[105]

The court relied on *Zeran*,[106] which had held AOL immune from liability with regard to defamatory material posted on the bulletin board. First, the court found that Amazon is provider or user of interactive computer services covered by the section 230.[107] The court rejected the plaintiff's argument that Amazon is not an interactive computer service provider because it did not provide access to the Internet.[108] The court said, "We find no case addressing application of the statute to interactive web site operators."[109] However, the court noted that Amazon's web site postings appear indistinguishable from AOL's message board for section 230 purpose.[110] According to the court, under the statutory definition, Internet access providers are only a subclass of the broader definition of interactive service providers entitled to immunity.[111]

Second, the court found that to subject Amazon to the kind of liability encompassed by the plaintiff's claims would be to treat Amazon as a publisher in violation of section 230.[112] The court rejected the plaintiff's argument that the provision bars only tort claims, and that his claim was based on contract law because Amazon had breached its promise to remove the offending statements from the web site. According to the court, the language of the statute does not limit the immunity to tort claims.[113] Relying on the legislative history, the court said the term "civil liability" used in section 230 includes contract claims.[114]

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[104] *Id.*

[105] *Id.*

[106] *Zeran*, 129 F.3d 327 (4th Cir. 1997). *See supra* discussion part III A.

[107] Interactive computer service "provides or enables computer access by multiple users to a computer server, including specifically a service… that provides access…". 47 U.S.C. §230(f)(2) (1996). *See also supra* discussion part II A.

[108] *Amazon*, 31 P.3d at 40.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 41.

Finally, the court found that the content of Amazon web site was provided by a third party. In this regard, the court rejected the plaintiff's argument that Amazon became the content provider by reserving the right to edit material and by claiming licensing rights in the content.[115] The court noted editing material provided by third parties was the type of activity that section 230 sought to protect.[116]

V. Implications

The Florida Supreme Court decision in *AOL* is consistent with the other court decisions since *Zeran,* in that the courts held ISP immune from liability for publishing defamatory material under section 230. While the majority rejected the argument that an ISP has distributor liability, the dissent clearly supported the view that ISPs, as distributors, should be found liable only if they had notice and were given a reasonable amount of time to remove the anonymous defamatory posting. The dissent is the first judicial recognition of distributor liability.

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[112] *Id.*

[113] *Id.*

[114] *Id.* at 42. (citing the Congressional Record that states, "this section provides 'Good Samaritan' protection from civil liability for providers or users of an interactive computer service…"). *See also* 142 CONG. REC. H1078-03, 1103 (1996).

[115] *Id.*

However, in *Amazon*, the court rejected the argument that Amazon has the distributor liability. Therefore, given the cases reviewed, it appears that, as the court in *Patentwizard v. Kinko's*[117] has stated, "For now, the section 230 of the CDA errs on the side of robust communication, and prevents the plaintiffs from moving forward with their claims against ISPs."[118]

In reviewing recent cases, it appears that the reach of section 230's immunity extends not only to the traditional ISPs, such as AOL and Prodigy, that provide Internet access to their subscribers, but also to a variety of "interactive computer service providers" such as Amzon.com and eBay.com. An Internet book vendor Amazon.com and an online auction company eBay.com do not provide Internet access. However, the courts recognized them as interactive computer services subject to section 230's immunity. In *Sotner v. eBay.com*,[119] eBay was also held immune from the liability arising from the plaintiff's claims. The court rejected the plaintiff's argument that eBay.com engaged in unfair business practices in that, knowing well that infringing sound recording auctions are prevalent on its site, eBay.com actively promoted and enabled those auctions, even though it could have eliminated the infringing auction.[120]

It is noteworthy that, while the court found eBay.com was immune, the court said that there is some point at which the existing immunity would no longer apply.[121] The court noted that the limits of the immunity have not yet been clearly defined. However,

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[116] Id. at 43. (citing Blumenthal v. Drudge, 992 F.Supp 44 (D.D.C. 1998))

[117] 163 F. Supp. 2d 1069 (DSD 2001).

[118] *Id.* at 5.

[119] 56 U.S.P.Q. 2d 1852 (Cal. Super. Ct. 2000).

[120] *Id.*

[121] *Id.*

the court said, any limitation placed on the immunity presumably would begin at the point at which providing otherwise lawful goods or services with knowledge that they are being put to an illegal use becomes the commission of a crime.[122] The court stated that, in order for liability to arise and the immunity to be lost, it would be necessary to show actual knowledge of illegal sales.[123] In light of this opinion and the plaintiffs' claims in the cases reviewed, it seems the notion of "actual knowledge" would be at the center of the debate in the legal claims against ISPs.

These recent cases demonstrate that the reach of the section 230 immunity is expanding in a new direction. It seems that the section 230 immunity not only covers all tort claims originating from third-party content, but also expands to all civil liability claims including contractual claims[124] and copyright infringement.[125]

VI. Conclusion

In light of the subsequent expansion of ISP immunity in *Amazon* and *eBay* as well as in *AOL*, it might appear that we have encountered a regime where ISPs may take "advantage of all the benefits conferred by Congress in the CDA, and then some, without accepting any of the burdens that Congress intended." [126] The dissent in *AOL* clearly addressed this issue.

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[122] *Id.*

[123] *Id.*

[124] *e.g. Jerome Schneider v. Amazon.com*, 31 P.3d 37 (Wash. Ct. App.2001).

[125] *e.g. Stoner v. eBay.com*, 56 U.S.P.Q. 2d 1852 (Cal. Super. Ct 2000).

[126] *Blumenthal v. Drudge*, 992 F. Supp. 44, 52-53 (D.D.C. 1998).

Given the consistent outcome of the cases interpreting section 230, it does not seem that Congress might revisit the "Good Samaritan" provisions in the near future. However, the court then might be required to interpret the language of the CDA with the question of whether section 230 appropriately applies to the Internet in the rapidly changing environment of new communication technologies. In clarifying the CDA, the court might need to recognize that the ISPs have added a variety of editorial functions that were unavailable when Congress enacted the CDA. In fact, among modern communications media, ISPs are unique in the ways they can act as both publishers and distributors of content.[127] In this regard, courts have yet to identify the point at which an ISP crosses the line from merely providing third-party content, particularly content provided by its commercial partners, to "creating" or "developing" that content and thereby becoming directly liable for the publication of that content.[128]

Some recognize that the notice-based liability is needed, arguing that Congress should adopt a notification process for defamation similar to the one used for potential copyright violations in the Digital Millenium Copyright Act.[129] However, given the criticism and argument over the notice-based liability provision, it is unclear whether the notification process could be an effective solution. Above all, it is crucial to prevent the standard for liability from having a "chilling effect" on speech in the Internet.

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[127] *Id.*

[128] Friedman & Buono, *supra* note 3, at 659.

[129] Butler, *supra* note 62, at 262; *See* Online Copyright Infringement Liability Limitation provision, 17 U.S.C. 512 (Supp. IV 1998). The Act provides that a written notification of claimed copyright infringement must be sent to an agent designated by the ISP. If the communication does not specifically comply with the requirements of the provision, then it cannot be used in considering whether the ISP has been given "actual notice or is aware of facts or circumstances from which infringing activity is apparent." If the notice does comply with the provision, then the ISP must respond expeditiously to remove or disable access to the material or risk liability.

Consideration of a legal framework for Internet regulation needs the discussion of how to reduce that potential "chilling effect" on Internet communication, and how the regulatory scheme can exist in the rapidly changing worlds within Cyberspace, where the Internet is entitled to the highest level of First Amendment protection.[130]

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[130] *See Reno*, 521 U.S. at 870.

Localism Reconsidered:
The Lessons of Docket 80-90 and Low Power FM

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ABSTRACT

Localism Reconsidered: The Lessons of Docket 80-90 and the Future of Low Power FM

Maximizing the diversity of available programming serves the public interest and the First Amendment interest in a robust marketplace of ideas. Although local content is only one aspect of diversity, it is of special concern because of its connection to the political structure and the public dialogue essential to democratic process. This paper compares the results of Docket 80-90 to the recent LPFM rulemaking, to assess the potential localism value of those stations and to consider the policy implications.

Localism Reconsidered: The Lessons of Docket 80-90 and the Future of Low Power FM

Localism is often described as one of the foundations of American broadcasting. Congress and the Federal Communications Commission (FCC), with the support of the courts, have long claimed that maximizing the diversity of available programming serves the public interest and the First Amendment interest in a robust marketplace of ideas. Furthermore, regulators have believed that locally oriented broadcasting is a key element of program diversity and serves important audience needs.[1] As one FCC commissioner recently put it,

> [f]or each American to benefit from the marketplace of ideas, there must be a diversity of sources of programming available in each community. Not just a variety of stations and formats, because variety and diversity are not the same thing, but diversity of ownership and diversity of programming reflecting the increasing diversity of our society. An informed citizenry, cognizant of the complexity and diversity of opinion on the issues of the day, is part and parcel of the public interest. And part and parcel of that informed citizenry are localism and the avoidance of excessive market power.[2]

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[1] *E.g.*, NBC v. U.S., 319 U.S. 190, 203 (1943) ("A station should be ready, able, and willing to serve the needs of the local community by . . . programs of local consumer and social interest."); U.S. v. Midwest Video Corp., 406 U.S. 649 (1972) (requirement of local cable program production facilities reasonably furthers the goal of "increasing the number of outlets for community self-expression." *Id.* at 668); *In re* Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments, *Report and Order*, 48 Fed. Reg. 29486, 29489 (1983) ("the Commission's basic objectives have been to provide at least one service to everyone, diversified service to as many persons as possible, and outlets for local expression addressing each community's needs and interests"); Cable Television Consumer Protection and Competition Act of 1992, 102 P.L. 385 (1992) §2(a)(10) ("primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming").

[2] Commissioner Michael J. Copps, "In Defense of the Public Interest," Remarks before the Federal Communications Bar Association (Oct. 15, 2001). Available online at http://www.fcc.gov/Speeches/Copps/2001/spmjc105.html.

Much attention has been given to trends toward media consolidation and the national homogenization of programming. In spite of those changes in the market, the FCC has continued to value and encourage local program origination intended to serve the needs of specific local audiences, most recently through the (re)introduction of low power FM (LPFM) licenses in 2000.[3] The as-yet unanswered question is whether this most recent regulatory attempt at localism will succeed where others have allegedly failed or become irrelevant.

Although local content is only one aspect of diversity, it is of special concern because of its connection to the political structure of the United States and thus the public dialogue at the heart of the democratic process. Are there lessons to be learned (and that perhaps were learned by the FCC) from earlier attempts at preserving or increasing local radio programming? This paper considers the example of the rulemaking that led to the great increase in the number of licensed FM stations over the past 15 years, and applies the analysis of those results to the more recent LPFM rulemaking. The goal is to assess the potential localism value of those stations in the context of a marketplace that has undergone rapid consolidation in the five years since the Telecommunications Act of 1996[4] greatly altered the structure of the ownership rules, and the appropriate regulatory structure to encourage local origination of programming.

I. Docket 80-90

A. The rulemaking

FM licenses were originally allocated on a demand basis: applications were granted if the new station would not cause interference within the 60 dBu (1 mV/m) predicted contour of an existing station's signal. The results of that process proved unsatisfactory, however. The

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[3] *In re* Creation of Low Power Radio Service, *Report & Order*, 65 Fed. Reg. 7615 (2000) (hereinafter LPFM Order].

Commission was disturbed in the early 1960s by the saturation of available frequencies in most major cities, at "the expense of nearby smaller localities."[5] The FCC established the FM Table of Allotments in 1963[6] to distribute FM assignments around the country on an equitable basis and to encourage new stations by allowing licensees to protect their full service area while initially putting a lower-powered station on the air, thus minimizing initial cost but allowing for later growth.[7] By the end of 1979, the number of FM stations had grown to more than 3000[8] and the FCC was again noting a shortage of frequencies relative to demand in some areas.

In March, 1980, the FCC proposed a dramatic increase in the number of FM channel assignments.[9] The Commission had been moving in a deregulatory direction.[10] Congress, too, was looking at many industries with an eye toward deregulation, including broadcasting, with proposals to rewrite the Communications Act.[11] As a result, the industry found itself going back

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[4] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[5] *In re* Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments, *Notice of Proposed Rulemaking*, 45 Fed. Reg. 17602, 17603 (1980), 78 FCC 2d 1235 [hereinafter 80-90 NPRM].

[6] Third Report and Order, 40 F.C.C. 747 (1963).

[7] 80-90 NPRM, *supra* note 5, at 17603.

[8] *Id.*

[9] The proceeding was initiated in response to petitions from two broadcasters proposing to amend the allocation rules to permit Class A stations (with their shorter spacing) on some Class B and Class C channels thus effectively increasing the number of FM allocations, as well as a petition NTIA which proposed more radical changes including directional antennas and more classes of stations. *Id.* at 17604).

[10] *In re* Deregulation of Radio, *Report and Order*, 84 FCC 2d 968 (1981); *In re* The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, *Report and Order*, 98 FCC 2d 1076 (1984). *See also* "The Laissez Faire Legacy of Charlie Ferris," *Broadcasting*, Jan. 19, 1981, pp. 37-42. Under Ferris' chairmanship, the FCC theme was "remov[ing] the commission from the marketplace." *Id.* at 37. As the chair passed to Mark Fowler, the FCC lifted or modified several other broadcast rules during this period relating to ownership, call letters, and main studio location.

[11] See, *e.g.*, Cyril Penn, "The Future of Radio—Will It Be Diversity or Monopoly," *Advertising Age*, June 25, 1979, p. 66 (re: the Communications Act of 1978, H.R. 13015); "Rewrite II: The

and forth between the two venues, looking for the best deal.[12] It was in this environment that Docket 80-90 was intended to foster the twin goals of diversity and competition by "expand[ing] the opportunities for new radio outlets,"[13] and to "reinforce [the FCC's] commitment to a structural approach to radio broadcast regulation."[14] Thus, it provides an ideal case to analyze the Commission's conception of localism in radio at that time and, in particular, consider the FCC's structural attempts to address the competition and diversity goals.

Specifically, Docket 80-90 proposed:[15]

1. to allow Class A facilities on Class B or C channels[16] if a Class A channel is not available in that location;[17]

Jawboning Begins in Earnest," *Broadcasting*, May 21, 1979, p. 32-33 (House begins hearings on H.R. 3333, the follow-up to H.R. 13015).

[12] Stanley E. Cohen, "Is the U.S. Ready for Radio Decontrol," Advertising Age, Sept. 24, 1979, p. 73.

> For two years, NAB blew hot and cold on the 'deregulation' bill of Rep. Lionel Van Deerlin . . . . Rep. Van Deerlin turned out to be embarrassingly serious about the theory that the free market is best and broadcasters found him unshakeable on provisions of the bill that help cable and tv superpowers at the expense of the TV bluebloods who fund NAB's operations.
>
> Now NAB stands to get from the FCC enough deregulation to please its radio constituents, and it can hold out the hope to the tv members that the lessons learned from radio deregulation will rub off on them.
>
> Rep. Van Deerlin, like the jilted lover, watches enviously from the sidelines. Deploring the latest round of chatter about the excessive sex and violence on tv, he chides broadcasters, 'The solution might not be with censorship of tv, but an increase in the number of program sources.'" *Id.*

[13] 80-90 NPRM at 17611 (Separate Statement of Charles D. Ferris, Chairman), *supra* note 5.

[14] *Id.* (Concurring Statement of Commissioner Tyrone Brown).

[15] *Id.* at 17604.

[16] Prior to this rulemaking, there were three classes of FM service, two of which were available in any given part of the country. (A fourth, Class D, had been recently deleted. See Chapter 4.) Class A stations were intended to offer local service to smaller communities while B and C stations were intended to serve larger, regional audiences. The country was divided into three zones: Zone I primarily covered the densely populated areas in the northeastern U.S.; Zone I-A included most of California; and Zone II covered everything else, primarily the less-densely populated south, midwest, and mountain states. Class A stations were permitted in all zones with 3 kW and 92 m HAAT facility maximums. Class B stations were allocated in Zones I and IA, with 50 kW ERP and 153 m HAAT maximums. Class C stations were allocated in Zone II, with

2. to add two new intermediate classes of stations, B1 (with maximum facilities of 20 kW ERP and 92 m HAAT) and C1 (with maximum facilities of 100 kW ERP and 305 m HAAT);
3. to permit Class B facilities in zone II;
4. to require existing B and C stations to meet minimum requirements for the category within three years or to be reclassified;[18] and
5. to adopt a new separation table reflecting the new classes that also reduced the protected area for Class B stations.

Many in the industry were opposed to the changes. Several broadcasters commented that, rather than improving service in the public interest, the new competition would lead to diminished news and public affairs programming in smaller markets,[19] while others argued that the existing service was sufficiently diverse and additional competition would be undesirable in general for economic reasons.[20]

Much of the opposition to the rule changes focused publicly on concerns about interference and reduced coverage areas for existing FM stations.[21] Some addressed this as concern that

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100 kW ERP and 610 m HAAT maximums. At the maximums, these services had predicted coverage radii of approximately 15 miles (Class A), 40 miles (Class B) and 65 miles (Class C). Minimum and maximum separation distances between stations on nearby channels, intended to minimize interference, varied from 15 miles (for two second- or third-adjacent Class A stations) to 180 miles (for two co-channel Class C stations), depending on the station classes and channel relationship. *Id.* at 17603, citing 47 CFR §§73.206-73.207.

[17] The Table of Allocations separated the 100 FM channels by class and type of service offered. The first 20 channels (between 88 and 92 MHz) were designated for non-commercial educational stations and were not formally part of the Table. Of the remaining 80 channels, 20 were reserved for Class A facilities with the rest divided between Class B and C depending on the geographic location. *Id.*

[18] Preliminary analysis by the FCC found that only 20% of Class C stations were operating at or near the category maximums, with 25% operating only at Class B levels. *Id.* at 17605.

[19] *In re* Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments, *Report and Order*, 48 Fed. Reg. 29486, 29488 (1983) [*hereinafter* 80-90 Order] (comments of Pennsylvania Association of Broadcasters and National Radio Broadcasters Association).

[20] *Id.* at 29488-29489 (comments of NBC, and ABC). *Cf.* Comments of the Advisory Committee on Radio Broadcasting (FCC should undertake more extensive economic impact studies before adopting the changes). *Id.* at 29488.

[21] *Id.* at 29490 (Comments of Multimedia, Cox, NBC, and ABC).

listeners in rural and suburban communities would receive less service.[22] In fact, at least two commenters argued that "the only practical way of serving many suburban communities is with wide-area metropolitan stations."[23]

When the FCC issued the initial 80-90 order in 1983,[24] the rules were similar to the original proposal. Class A stations would be permitted on B/C channels;[25] three new classes of stations were created (B1 in Zone I and IA, and C1 and C2—rather than Class B—in Zone II);[26] existing facilities were given three years to meet the new class minimums or face reclassification;[27] and new Class C stations would have to meet the minimum facility requirements as soon as they signed on.[28] However, implementation of the rulemaking would be some time away. The FCC did not have the staff to process several thousand new license applications, and so delayed the effective date of the new rules for a year.[29]

There were also a number of procedural issues the Commission needed to address, and the diversification goal was central to consideration of those. Specifically, a number of commenters in the rulemaking raised the issue of license preferences in the new allocation for current licensees of daytime-only AM station, class A or short-spaced FM stations, and NCE FM stations.[30] Although the FCC declined to address those questions directly within the initial 80-90 rulemaking, there were other proceedings already active or soon started that would provide answers to those and other questions.[31]

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[22] *E.g.*, Comments of NBC, *id.* at 29491.
[23] *Id.* at 29491 (Comments of Multimedia Inc. and Cox Broadcasting).
[24] *Supra* note 19.
[25] *Id.* at 29488 and Appendix C, 29504-29511.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 29498.
[30] *Id.* at 29497-29498.

B. Analysis and Discussion

Access to media clearly increased on the owner/producer side[32] once the Commission began licensing the new stations—at least initially—in the sense that hundreds of new licenses became available where none had been before. Indeed, far beyond just a few hundred new stations, the subsequent growth has reached levels approximating the potential demand the Commission foresaw when it reported need for nearly 4000 new stations to the International Frequency Registration Board of the International Telecommunications Union in November 1981.[33]

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[31] See *In re* Implementation of BC Docket No. 80-90 To Increase the Availability of FM Broadcast Assignments, *First Report and Order*, 50 Fed. Reg. 3514 (1985) (weights the FCC would apply to various factors in the computer model used deciding on the locations for new allocations); In re Implementation of BC Docket No. 80-90 To Increase the Availability of FM Broadcast Assignments, *Second Report and Order*, 50 Fed. Reg. 15558 (1985) (amending the comparative hearing criteria to provide integration credit for daytime AM licensees who apply for a new FM in the same community, and setting the process for opening filing windows for the new allocations as well as re-opening the Table of Allotments for amendment petitions). See also various orders resulting from petitions for reconsideration to amend the original list of 689 cities to receive allocations, including *Third Report and Order*, 50 Fed. Reg. 31721 (1985) (East Ridge, TN); *Memorandum Opinion and Order*, 50 Fed. Reg. 47391 (additions, deletions, or substitutions in 30 communities); *Summary of Fourth Report and Order*, 51 Fed. Reg. 23761 (additions or substitutions in eight markets), and *Summary of Memorandum Opinion and Order*, 51 Fed. Reg. 36401 (disposing of another 23 petitions).

[32] The number of FM stations has doubled since the rulemaking began, far more than the 689 stations originally created by the rulemaking's changes to the Table of Allocations. According to BROADCASTING YEARBOOK, there were 3155 commercial FM stations (of 4193 total) on the air in January 1980. By January 1990 (five years after the rule implementing the allocations was released), there were 4258 commercial FM stations, an additional 1103—far more than 80-90 originally allocated (5678 total FM stations on the air). Before the repeal of the ownership caps in the 1996 Telecommunications Act, there were 5296 commercial FM's and 7111 total FM stations on-air. As of June 2001, there are 6000 commercial FM stations and 8216 total, plus an additional 3416 FM translator/booster facilities (http://www.fcc.gov/mmb/asd/totals/index.html).

[33] 80-90 Order, *supra* note 19, at 29489 (n. 10 and accompanying text).

Although it is not a particularly original observation, it is significant that the broadcast industry will predictably, and vigorously, oppose any attempt to diversify through policy or rule changes. The position articulated by incumbents can be summed up thusly: (1) additional competition will (further) fragment the audience and advertising, thus cause programming cutbacks and diminish rather than increase our collective ability to serve the public; (2) we are already sufficiently diverse; and (3) additional stations will harm existing stations and audiences by creating interference. Incumbent broadcasters attacked the 80-90 rules on all these fronts, and were largely successful in gaining advantages for themselves.[34]

Examining the actual results and industry practices in subsequent years casts the economic and interference arguments as dubious at best. For example, between 1990 and 1998,[35] the number of commercial radio stations grew slightly more than 11%, from 9379 (4987 AM, 4392 FM) to 10455 (4685 AM, 5892 FM); the number of commercial television stations grew about 9%, from 1117 (564 UHF, 553 VHF) to 1221 (660 UHF, 561 VHF).[36] During the same period, total radio station ad revenue grew 60%, from $6.397 billion to $10.253 billion; television ad revenue increased 38%.[37] Expenses grew at a slower pace for radio, rising 34% from $6.317 billion to $8.474 billion, although television's expenses grew 39% during the period[38] (primarily due to rapid escalation in costs for programming and growth in news). The radio industry's gross margin rose from a relatively slim 9.2% in 1990 to 21.9% in 1998.[39] Television's margin was 15.3% in 1990, 20.4% in 1998—a slightly worse performance than radio, but still healthy. As a further indicator of health, radio's local ad revenues[40] grew even more rapidly, rising 65% from $4.77 billion to $7.896 billion.[41] Television's local ad revenues were up 45% during the same period.[42] In other words, rather than an increasing number of stations following implementation of Docket 80-90 causing economic damage to the industry, preventing them from discharging their public interest obligations, radio owners found ways to create tremendous economic gain.

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[34] *E.g.*, the integration credit for existing daytime AM licensees that applied for a new FM station, 50 Fed. Reg. 15558 (1985), *supra* note 31.

[35] This is the period covered by the most recently released government data. Figures in the 2000 BROADCASTING AND CABLE YEARBOOK indicate that the general trends discussed below continue.

[36] Federal Communications Commission totals as of Dec. 31 each year, available at http://www.fcc.gov/mmb/asd/totals/index.html.

[37] U.S. Census, STATISTICAL ABSTRACT OF THE UNITED STATES (2000), p. 571 (Table 920: Radio and Television Services-Finances 1990-1998).

[38] *Id.*

As for concerns about interference, the Commission created explosive growth in the number FM translators and boosters on the air during the 1990s through changes in the rules governing their use by NCE stations.[43] The co-existence of thousands of low-power translators and boosters across the country, stations which are actually prevented from originating programming, alongside full-power stations within existing interference guidelines demonstrates the fallacy of the concerns.

The 80-90 rulemaking was far from the only significant change taking place in the ownership structure of broadcasting, and the other rule changes limited both the access for new ownership and the long-term diversification potential. Ultimately, it was the deregulation of the industry[44] and other shifts in favor of "marketplace" regulatory solutions that probably had a much more significant effect on the nature of broadcast ownership in the United States.

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[39] Obviously, these aggregate figures do not provide a full picture and individual operator results certainly would vary widely. However, the real point is that these numbers belie the gloomy picture repeatedly painted by the NAB (that increases in the number of outlets or other competition will ruin the industry) in comments to the Commission.

[40] These totals are perhaps a more important indicator because they represent a disproportionate percentage of the income at smaller market stations, often 90% or more, compared to big market counterparts who receive a far larger percentage of national ad dollars and network compensation.

[41] STATISTICAL ABSTRACT OF THE UNITED STATES (2000), p. 571 (Table 920).

[42] *Id.*

[43] See *infra* notes 90-99 and accompanying text.

The tension between a regulatory structure that is based on a public trustee approach versus a free market approach is—at least in part—a tension between those who believe that the audience has needs that should be met by programming that can be defined and should be encouraged through regulation by an expert entity, and those who believe that the audiences' needs should be self-defined and can be best determined by media companies operating in a market free from proscriptive or prescriptive content regulations. These contrasting views also represent differing interpretations of the purpose of the First Amendment.

The "trustees" argue that the media marketplace is imperfect in many ways, and that what the marketplace alone will readily provide is better defined as "wants" than "needs," and only certain wants at that. There are information needs—needs that define the very purpose of a free press and freedom of speech because they are essential to effectively fulfilling our responsibilities as citizens—that may not be met without regulatory encouragement. There are also minority-interest needs (and wants) that will often be ignored, especially where there is no vehicle by which audiences can pay directly for programming no matter how much they might desire it. More expansive views of the First Amendment that recognize a value in self-expression and in communication about matters that might go beyond political issues would consider these needs and wants as significant and appropriate for policy action as well. Finally, there remains the question of whether there is some public benefit worth pursuing to a system that will provide some information (or entertainment) goods regardless of the ability of a given individual to pay.

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[44] *E.g.*, Deregulation of Radio, *supra* note 10.

"Marketeers" counter that adults should be capable of determining what their needs are, and that while some regulation may have been appropriate back when there were a few hundred radio stations in the country, the regulatory need no longer exists when the contemporary electronic media environment offers the riches of dozens if not hundreds of outlets for all—as long as they have the ability to pay for it. In this view, the First Amendment does not guarantee everybody an outlet, nor does it say anything about whether those who are fortunate to have access to the means of communication have any obligation to the rest of the population. If enough people are interested in some type of information or entertainment content, the commercial marketplace provides sufficient incentives for somebody to provide it—or so the theory goes.

If—and it is a very big if—the audience has access to a multitude of outlets that are more or less equivalent in a structural sense,[45] then there would indeed be precious little reason to continue to impose the traditional "public interest" content regulations. However, such a conclusion relies on a number of assumptions. First, there must be substantial independent competition between those outlets. Deregulation proponents generally point to the growth in the number of broadcast stations and the development of cable and other multichannel video services. The claim has flaws, however, for those are not perfect substitutes for broadcasting as

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[45] *See* Statement of Dr. Mark N. Cooper, Consumer Federation of America, Roundtable on FCC Ownership Policies, Oct. 29, 2001, available at `http://www.fcc.gov/ownership`.

> [D]ifferent types of media represent distinct product and geographic markets. [footnote omitted] While the advocates of convergence equate all media, the reality is that different media serve different needs, have different content, and differ widely in their impact and effect. People use different media in different ways, spend vastly different amounts of time in different media environments, consume services under different circumstances and pay for them in different ways. In economic terms, they are separate markets with weak substitution effects. . . . [I]n some respects, the specialization of each is worth preserving because of the unique

they impose additional cost on the consumer and frequently have little or no locally based programming other than that provided by existing broadcasters (which is still essential in several ways). In addition, although the number of radio and television **stations** in many markets is sizeable and nearly always exceeds the number local print outlets, the number of **independent voices** is not so large and indeed is shrinking as local consolidation continues in radio and begins in television. The extent to which consolidated station groups provide competing voices on issues of public importance, and would thus justify a regulatory attitude that protects their economic position while imposing no content requirements, is open to question.

Second, the marketplace model assumes that audiences have perfect (or at least near-perfect) knowledge of the options available to them. That was a dubious assumption decades ago.[46] In an era where content that might be of interest or importance could be on any one (or even several) of hundreds of channels, it becomes a difficult and time-consuming task to be aware of what is available and where it can be found.

Finally, it assumes that the mechanisms for paying for programming are sufficient indicators of audience interest. Although multichannel services improve this area somewhat, bundling, program tiers, and capacity issues still mean that, as with broadcasting, an individual audience member or even groups as large as a substantial minority of a given population are very limited in the ability to directly affect the production and distribution of programming in a market.

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functions provided in the marketplace of ideas. *Id.* at 2.

[46] *See* Carrie Heeter and Bradley Greenberg, CABLEVIEWING (1988); Douglas A. Ferguson, *Channel Repertoire in the Presence of Remote Control Devices, VCRs and Cable Television*, 36 J. OF BRDCST. & ELEC. MEDIA 83 (1992). Viewers have a repertoire of approximately 5-12 channels and are unlikely spend any significant time with others or even to know what is available on others.

Although increasing the number of "outlets for local expression" was one of the primary goals[47] of 80-90, the FCC took other actions during that time that served to greatly diminish the diversifying effects those licenses might have otherwise had.[48] Those changes included the elimination of the anti-trafficking rule[49] and raising the seven station per service ownership cap to 12[50] and then 20.[51] Although Rep. Van Deerlin, among others, had suggested one solution to the perceived programming ills in the late 1970s was an increase in the number of outlets,[52] it is questionable how effective that solution could be if the new outlets eventually were controlled by the same entities as the old outlets (which is what eventually happened).

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[47] *See, e.g.*, 80-90 Order, *supra* note 19, at 29489 ("The rule changes adopted herein will . . . provid[e] opportunities for new local outlets . . . .").

[48] It can also be argued that the economic downturn in 1989-90 and the subsequent negative impact on radio ad revenues contributed to the consolidation of ownership. However, the economy has always moved in cycles and broadcast owners (like any business operator) should plan for—and find ways to survive—difficult periods. The difference in this case was FCC's earlier decisions to permit larger groups, *infra* note 50, and the rapid transfer of ownership, *infra* note 49. These changes were significant factors for owners (and their backers) leading to the rapid rise in station prices to speculative levels. As a result of over-paying, with overextended credit, many owners faced catastrophic economic problems during the relatively mild recession at the end of the decade. This led, in part, to the second expansion of the ownership caps, *infra* note 51, and another round of consolidation.

[49] *In re* Amendment of the Commission's Rules Regarding Applications for Voluntary Assignments or Transfers of Control, *Report and Order*, 47 Fed. Reg. 55924 (1982). This rule, intended to assure that broadcasters acquired a station with the intent of operating it in the public interest, not merely for the purpose of turning a quick profit, prohibited licensees from transferring a station within a short time.

[50] *In re* Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, *Memorandum Opinion and Order*, 100 FCC 2d 74 (1985). Under these rules, minority owners were permitted up to 14 stations.

[51] *In re* Revision of Radio Rules, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 7 FCC Rcd 6387 (1992). The rule originally set the cap at 18, with a provision to raise to 20 in 1994. Minority owners could control up to 25 stations. Non-minority owners could have a non-controlling interest in up to five additional stations if they were minority controlled. *In re* Revision of Radio Rules, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7183 (1994).

[52] Cohen, *supra* note 12.

While most of the industry argued that changes in the media justified raising the caps on ownership, *Broadcasting* noted the opinion of at least one radio group owner opposed to lifting the 7-7-7 limit in 1983:

> [A]ny larger limits would be bad for radio in particular. As groups get bigger, he said, they get farther away from personal involvement with their stations, more involved with profits, and the idea of community service suffers. "It results in a very impersonal approach to what is a very personal subject," he said. . . . "You can make enough money with 14 radio stations."[53]

With hindsight, concerns raised about the impact of trafficking and large group ownership on the public interest and especially the ability of new entrants to acquire stations or of those stations to deliver locally originated programming seem remarkably prescient. As the FCC noted in the report abolishing the anti-trafficking provisions, the rule was adopted twenty years earlier in part due to the Commission's concern that "'speculation' in licenses would increase station prices, excluding all but the wealthy from ownership."[54] In deleting the rule, the FCC decided that station prices were not its concern and should be left to market forces, and that other efforts to expand ownership opportunities were better suited to encourage diversity and new entrants.[55]

Beyond concerns about "impersonal" service, it appears that the result of the change was speculation in broadcast licenses in many cases and the economic exclusion of many otherwise qualified potential licensees. The price of stations indeed skyrocketed as stations began to rapidly change hands[56] making entry much more difficult for new and minority broadcasters. The situation has not improved in subsequent years.[57] As one author found, "the idea of broadcasting in the public interest, through local and diverse programming, is overshadowed by the absentee group owners' interests in building media empires."[58]

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[53] "Decline and Fall of the Rule of 7's," *Broadcasting*, Nov. 28, 1983, p. 23-25, at 23.
[54] *In re* Amendment of the Commission's Rules Regarding Applications for Voluntary Assignments or Transfers of Control, *Report and Order*, 47 Fed. Reg. 55924 at ¶24 (1982).
[55] *Id.*
[56] *E.g.* Geraldine Fabrikant, "Hot Market For Radio Stations," N. Y. Times, July 1985, p. D1 (radio transfers jump 20% from 1983 to 1984; "Deregulation has spurred much of the activity."); Dennis McDougal, "Station Prices Soar," N. Y. Times, Dec. 27, 1985, p. 1 (the average price of a station had doubled in the previous five years and was expected to double again in the next 12 months).

Although there was an increase in the number of stations that most audience members would be able to receive, that was the only clearly positive result. Questions remain about the extent to which the other goals were achieved. A quick glance through the trade publications of the relevant years would reveal that there are certainly a greater number of formats than existed in 1980, but that does not necessarily equate to more diverse program content[59] across the stations in a market.[60] Radio programming now is more narrowly targeted and audiences are more fragmented, although a look through the playlists of competing stations or the industry charts of airplay in different formats often reveals substantial crossover which calls even the degree of variety into question. Even substantial minority tastes remain frequently under-served, something satellite broadcasters Sirius and XM are counting on—at least in part—to drive subscriptions to those new services.[61]

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[57] The changes in the wake of the 1996 Telecommunications Act make the trafficking activity and growth in the valuation of properties in the 1980's seem rather timid. In 1996, there were 671 radio transfers (standalone AM and FM stations) and 345 groups sales. The number of sales grew 37% between 1995 and 1996, but the astonishing change is in the value of those stations. The average price for a standalone AM or FM in 1995 was 1.5 million dollars, hardly small change; but in 1996 it nearly tripled to 4.3 million dollars. The total value of all radio transactions (standalone and group) was nearly 14.9 billion dollars in 1996, a jump of more than 300% over the previous year. In fact, the total value of radio transfers the previous three years (1993-1995) was barely half of 1996's total (7.9 billion) and you would need to add up the previous eight years (1988-1995) to roughly equal the 1996 total value. Factoring in television, the total dollar value of all station transactions (radio and TV) tripled from 1995 to 1996, from 8 billion dollars to 25 billion dollars. "45 Years of Station Transactions," BROADCASTING & CABLE YEARBOOK, p. A-109 (2000). *See also* National Telecommunications and Information Administration, "Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States" (2000) (conclusions include: minority ownership continues to be disproportionately small; is shrinking as a percentage of television licensees; most minority licensees control stand-alone stations; and minority radio ownership is concentrated on the AM band). *See generally* Jill Howard, *Congress Errs in Deregulating Broadcast Ownership Caps: More Monopolies, Less Localism, Decreased Diversity, and Violation of Equal Protection*, 5 COMMLAW CONSPECTUS 269 (1997).

[58] Howard, *id.* at 287.

[59] The distinction between diversity and variety is relevant here. The difference is wants (variety) as opposed to needs (diversity). Needs transcend individual preferences and focus on interests common to a community. Theodore L. Glasser, *Competition and Diversity Among Radio Formats: Legal and Structural Issues*, 28 J. OF BRDCST. 127 (1984).

[60] Because individual listeners generally only have access to the radio stations in their local market, that is the relevant analytical frame.

Is programming localized, even if ownership is not? It would be hard to find evidence for such an argument, although evidence to the contrary is plentiful. Radio in 2002 is characterized by "rimshot" class A stations trying to identify as metro stations;[62] remote voice-tracking and other centralized programming functions increasingly playing major roles in the strategies of large radio owners such as Clear Channel;[63] and a tremendous utilization of network and syndicated programming for radio as cost-saving measures.[64] Industry insiders admit that the prices paid for stations after deregulation had a negative effect on programming, as stations cut back staff to minimize costs.[65]

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[61] Andrea Adelson, "Satellite Radio's Bet on Dissatisfied Listeners," *New York Times on the Web*, July 30, 2001. Available at http://www.nytimes.com.

> Listening has slipped 11 percent since the early 1990's, according to Arbitron audits. Critics blame the economics of corporate consolidation and the pressures on managers to take few risks and stick to programming that pleases advertisers by drawing the largest possible audience. . . . There is little room for niche formats like all-opera. Two rival start-ups, XM Satellite Radio Holdings Inc. and Sirius Satellite Radio hope listeners—especially motorists—are dissatisfied enough with mainstream radio to pay . . . . *Id.*

[62] Since 1983, stations may use multicity station identification that includes any city they wish. *E.g.*, a station licensed to Anderson, Indiana could ID as "WXXX, Anderson-Indianapolis." The FCC repeatedly wrestled with concerns regarding whether suburban stations were serving their smaller city of license or the larger metro area, in particular with whether it was appropriate to grant allocation preferences to applications proposing a smaller suburban community as the city of license against mutually exclusive applications indicating the larger central city as the location. *E.g.*, The Suburban Community Policy, the *Berwick Doctrine*, and the *De Facto* Reallocation Policy, *Report and Order*, 93 FCC 2d 436 (1983) (which held that a station that covers its community of license is presumed to intend to serve that community even if the signal covers a larger area). *See also* "FCC Proposal to Change Definition of 'Community' Hears Pros, Cons," *Broadcasting*, July 18, 1983, p. 32-34 (Commission considering lumping all parts of a SMSA as one "community" for license allocation purposes).

[63] Jeff Leeds, "Clear Channel: An Empire Built on Deregulation," *Los Angeles Times*, Feb. 25, 2002. Available at http://www.latimes.com. (Clear Channel is "betting on repackaging radio shows across the country. . . . [P]rogramming recorded in Los Angeles is exported to Des Moines

Available syndication and network services cover a wide range, from all manner of short-form programming to 24/7 full-service networks. Within each category, there are a handful of competitors. For those desiring a complete format, there are small single offerings like Morningstar Radio Network ("24-hour live contemporary Christian music by digital satellite") and large syndicators like Jones, Westwood One, and ABC that each offer a range of 24-hour format choices from adult contemporary to various Spanish formats. A substantial number of stations post-80-90 have affiliated with 24-hour full-service format network programmers, although exact figures are hard to come by. Of the major providers, ABC currently claims more than 750 stations reaching more than 98% of the U.S.[66] Jones boasts 1200 affiliates for their dozen full-service formats.[67] Thus, those two alone would account for nearly one-fifth of all

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and Jacksonville, Florida, as a series of taped moments, from phone calls to song intros, that are spliced together to sound as if the deejays are chatting from a studio down the street. The voice-tracked segments, music, and commercials can whisked from one station to another on a digital network that is potentially available to 80% of Clear Channel's stations. Producers cut and paste the segments to create the appearance of deejays taking live requests and calls from listeners, or even record half of a conversation for live deejay to interact with." *Id.*). *See generally* Greg Newton, "Music Programming," *in* BROADCAST/CABLE/WEB PROGRAMMING: STRATEGIES AND PRACTICES (Susan Tyler Eastman and Douglas A. Ferguson eds., 6th ed. 2001).

[64] BROADCASTING & CABLE YEARBOOK (2000) lists 55 format providers, pp. F69-70. These offerings range from short programs to complete 24/7 formats. *Cf.* "Recent Spate of FM Applications Affiliating With New 'Networks'," *Broadcasting,* Feb. 13, 1984, p. 201-204 (FCC noting a ten-fold increase in FM NCE applications over the previous six months compared to the same period in the previous year, nearly all of which were affiliated with—and apparently receiving financial and logistical support from—two network programmers).

[65] *E.g.*, Jerry Del Colliano of *Inside Radio* was quoted by the New York Times in 1985 as predicting one result of the cost cutting will be "desperation programming." He advised listeners "not to fall in love with their radio stations." McDougal, *supra* note 56.

[66] http://www.abcradio.com/24hr/galaxy.shtml.

[67] http://www.jones.com/jrn.html.

commercial stations in the country.[68] Considering that those affiliates are most likely to be found among the 6000[69] FM stations (since the formats are music programming), the relative concentration is really much higher.

C. Summary

Ultimately, this should have been an easily foreseeable result of the FCC's shift away from programming guidelines to an emphasis on structural regulation and reliance on the goodwill of licensees as a means of encouraging the desired content diversity—especially local and public interest programming. In the language of the Commission, this rulemaking and subsequent amendments to the Table of Allotments were intended to provide ***opportunities*** for local expression. Whether they actually created more and new local content was solely at the discretion of the licensee, who—for well-established economic reasons—may decide that a full slate of programming from outside the community (or targeted to a wider community) was a better option. In the absence of other incentives or requirements to create and deliver locally produced content, many licensees did just that.[70] This is not to say that such programming cannot or does not have diversifying benefits for the audience; nor that it necessarily cannot or does not serve at least some of the needs and interests of the community of license. However, in the rhetoric of the rulemaking, the notions of local and community are clearly based in the geographic location of the station. Moreover, every decision to affiliate with an existing national programmer is one less opportunity for a new voice to gain access.

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[68] Non-commercial radio fares a little better, but only a little. National Public Radio and Public Radio International claim 610 and 590 affiliates respectively (of the 2200 NCE stations in the U.S.), although it should be pointed out that many of those affiliates are carry one or more programs from both services and may not count on the national programming for all of the day.
[69] As of June, 2001 (most recent available). Station totals available at http://www.fcc.gov/mmb/asd/totals/bt010630.html.
[70] Factoring in Westwood One, who's affiliate totals are not publicly available, and the several smaller providers, it is not unreasonable to suggest that between one-third and one-half of the commercial stations in the country currently provide little to no local programming other than commercials.

Docket 80-90 promised hundreds, if not thousands, of new radio voices. Although the stations did materialize over time, the degree to which they have diversified the marketplace is questionable. Although this rulemaking did attempt to address diversity concerns, its impact was negated through other simultaneous and subsequent changes to the regulation of broadcasting that encouraged the formation of larger ownership groups and more centralized programming functions, and removed the regulatory guidelines that encouraged local programming. Nevertheless, the FCC continued to promote the notion of localism and, nearly 20 years after 80-90, would return to the idea of opening the broadcast spectrum to new, local entrants.

II. Low Power FM

A. The original low power FM

From 1948 to 1978, the FCC issued Class D licenses to college and community stations,[71] permitting low-power operation[72] in the non-commercial part of the FM band.[73] These stations represented a variety of operational styles, from student-run college (or sometimes high school) stations to civic groups or associations, generally all volunteer, formed for the express purpose of operating a radio station. By their very nature, these operations with limited power and staffed largely with volunteers who were at least arguably committed to their community would appear to personify the localism ideal. The stations' programming was primarily locally originated and generally focused on entertainment and information of particular relevance to the community immediately surrounding the transmitter and studios, often featuring material not available through full-power stations.[74]

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[71] See *In re* Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations, *Second Report and Order*, 69 F.C.C. 2d 240 (1978) [*hereinafter* NCE Changes]. In this proceeding, the FCC announced that it would no longer accept applications for Class D FM licenses, and that existing Class D stations would have to either assume secondary status or upgrade their facility to the minimum Class A standard of 100 watts effective radiated power (ERP).

[72] The engineering parameters for these stations were calculated differently from the normal (for FM) ERP and Height Above Average Terrain (HAAT) figures. Class D stations were allowed a maximum of 10 watts transmitter power output and assumed to have an antenna height not exceeding 100 feet. *Id.* at 242, note 6.

There were periodic suggestions to expand low power service that were not adopted. In 1949, the FCC received a petition to amend its FM rules to permit low power FM operation by any tax-exempt non-profit organization (an exemption reserved at that time for non-commercial educational stations).[75] Much like the LPFM proponents a half-century later, the Baptists were interested in a low-cost method of entry to broadcasting. After an extended comment period and a hearing, the Commission declined to create the requested service because it concluded that there was not really much demand for such a service beyond the petitioners themselves.[76] However, there were two dissenting votes.[77] In the opinion of Commissioners Walker and Jones, there was a significant public interest, and specifically a local community interest that preceded and superseded broadcasting, to be served.

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[73] At the time, the noncommercial reservation included FM channels 201-220, 88.1 MHz to 91.9 MHz. Channel 200 (87.9) was added in the same rulemaking in which the FCC ceased granting new class D licenses. *Id.* at 257-260.

[74] See, *e.g.*, Lorenzo Milam, SEX AND BROADCASTING: A HANDBOOK FOR STARTING A RADIO STATION FOR THE COMMUNITY (4th ed., 1988) ("There is a member of the Birch Society, or the SWP, or the local Conservation group--who has been denied a voice for all of his 50 years." *Id.* at 70.)

[75] *In re* the Joint Petition of the Radio Commission of the Southern Baptist Convention and the Executive Board of the Baptist General Convention of Texas. Memorandum Opinion and Order, 16 F.C.C. 46 (1951). The initial petition covered only churches but was subsequently amended.

[76] *Id.* at 47.

[77] *Id.* In addition, Commissioner Hennock did not participate in the decision, thus the vote was actually relatively close.

> The primary influence that the clergy have always exercised in community affairs answers a personal and public need of our people. Radio and television broadcasting has been superimposed upon the community life. There is no reason why this continuing personal and public need should not be utilized primarily by the clergy in radio as suggested by the petitioners.[78]

In another instance, in a speech to the 1977 NAB Annual Convention, then-House Communications Subcommittee chair Lionel Van Deerlin suggested reallocating 20 megahertz of spectrum, either UHF channels 67, 68, and 69 or a then-idle block in the land mobile spectrum, for several hundred low-power FM stations intended primarily for small portions of metropolitan areas.[79] The FCC apparently never seriously considered the idea.

B. The demise of Class D

In 1972, the Corporation for Public Broadcasting petitioned the FCC to explore several issues related to "efficient use of the FM channels set aside for noncommercial educational purposes."[80] The years following 1967 had seen a rapid growth in the demand for FM noncommercial educational (NCE) stations fueled by grant monies available from CPB and the Department of Health, Education, and Welfare.[81] Within a few years, CPB in particular was concerned about what it perceived as an FM dial overcrowded with low-power stations blocking further expansion of its network of large, professional stations.[82] Specifically, CPB argued that Class D stations should be treated as a secondary service.[83]

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[78] *Id.* at 48. Despite the awkward language, the dissent offers an important vision of radio's communicative role in supporting local community life.

[79] *New York Times*. March 31, 1977, p. C28.

[80] NCE Changes, *supra* note 71 at 240. Concerns about the impact of Class D stations on the efficient allocation of the non-commercial portion of the FM band were first raised before the Commission more than a decade earlier. *Id.* at 241 citing *Notice of Inquiry and Notice of Proposed Rulemaking and Memorandum Opinion and Order in Docket 14185*. 21 RR 1655 (1961). At that time, however, the FCC had tabled any action for lack of any clear need or strong support from broadcasters themselves to change the status quo. *Id.* at 242, citing Docket No. 14185, 31 Fed. Reg. 14755, 14756 (1966).

[81] *Id.* at 241.

In response to the CPB filing, the FCC proposed the following changes for Class D stations:

1. Class D stations would no longer be protected from interference by another 10-watt station; however, they would still have to protect all other stations.
2. Class D would become a secondary service, subject to bumping from its channel by any new full-power station or by an increase in facilities by any full-power station.
3. Class D stations would be moved to the commercial part of the FM band or channel 200. Stations wishing to remain on their present assignment would need to upgrade to the minimum Class A standard (100 watts).[84]

In comments to the Commission, CPB (and others, ironically including the National Federation of Community Broadcasters) argued that all the 10-watters were effectively blocking more efficient use of the spectrum that could be achieved by fewer stations operating with greater power.[85] Essentially, CPB and its supporters were arguing for more stations that met its qualifying guidelines for size and professionalism,[86] at the expense of smaller operations.

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[82] For a more detailed history of the often antagonistic relationship between CPB and community radio stations, see Jesse Walker, With Friends Like These: Why Community Radio Does Not Need the Corporation for Public Broadcasting, Cato Policy Analysis No. 277, July 24, 1997. Available from Cato Institute, 1000 Massachusetts Avenue NW, Washington D.C., 20001; or online at http://www.cato.org/pubs/pas/pa-277.html.

[83] NCE Changes, *supra* note 71, at 244.

[84] *Id.* at 244-45.

[85] *Id.* at 246. In support of restricting Class D, NFCB wrote

> were it not for existing Class D stations, at least 40-45 new high-power noncommercial FM stations in the top 100 markets could be established
> and . . . significant power increases could be obtained for another 25-30 existing stations. *Id.*

The projections proved wildly overoptimistic, however. By 1980, NFCB reduced its projection of 45-50 new stations down to 12-20. Scott M. Martin, *Educational FM Radio--The Failure of Reform*, 34 FED. COMM. L.J. 431, AT 452 (1982).

[86] Although there have been slight modifications over time (primarily in the budget requirement), current minimum requirements for FM stations are Class A or better facilities, five or more full-time paid staff members, 18 hour/7 days-a-week hours of operation and a non-federal money

Supporters of Class D stations countered with three arguments for retaining the service in its present form, including the primarily local nature of the service.[87]

In announcing its decision in 1978, the Commission noted "we have never operated on the belief that these stations do not respond to discrete local needs."[88] Nevertheless, with an overriding emphasis on the efficiency argument put forth by CPB, the FCC announced the new rules and stopped accepting any new Class D applications.[89] In the FCC's view, there was not sufficient spectrum available for both full-power, large coverage area stations and locally devoted low-power operations. However, the FCC has not been particularly consistent in their analysis of spectrum issues. Indeed, shortly after declaring that spectrum efficiency concerns made the elimination of low power local radio desirable, the FCC greatly expanded the use of low power transmitters to deliver *non-local* programming.

C. FM translators and boosters

Translator (and booster) service has been used for television[90] as well as commercial and NCE FM broadcasting.[91] These licensees are prohibited from originating content, with the exception of short donor solicitation announcements on translators not owned by the originating

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budget exceeding $195,000. Even excepting the Class A requirement, few Class D's were capable of meeting the other standards, particularly in terms of full-time staff and budget.

[87] NCE Changes, *supra* note 71, at 246-247. The other arguments, both less persuasive, focused on Class D stations as a kind of intermediate step for the participants: as a training ground for young broadcasters and as a stepping stone to larger facilities for stations themselves.

[88] *Id.* at 248.

[89] *Id.* at 250. The new rules did not apply to Alaska, however, which uses a different FM allocation scheme. *Id.*

[90] See 47 C.F.R. §74.701 *et seq.* for LPTV and television translator rules. *See also Report and Order*, 56 F.C.C. 446 (1956), the initial FCC action authorizing UHF TV translators; and *Report and Order*, 20 Rad. Reg. 1536 (1960), which provided the basis for the current system, modifying the UHF rules and providing for VHF translators.

[91] FM translators are authorized at 47 C.F.R. §74.1201 *et seq. See also* In re Amendment of Part 74 of the Commission's Rules and Regulations to Permit the Operation of Low Power FM Broadcast Translators and Booster Stations, 20 Rad. Reg. 2d (P&F) 1538 (1970).

station. Rather, they retransmit the signal of an existing full power broadcaster. Originally, they were conceived as a way to provide programming in areas where no service existed before ("white area" coverage), whether due to technical or economic considerations; or to fill in coverage gaps, due to terrain or other interfering factor, within the originating station's predicted contour.[92]

In perhaps the most substantial example of the FCC's slip away from localism, the Commission created explosive growth in the number FM translators and boosters on the air during the 1990s through changes in the rules governing their use by NCE stations.[93] The co-existence of thousands of low-power translators and boosters across the country alongside full-power stations within existing interference guidelines demonstrates the fallacy of the FCC's position in the Class D proceeding.

These low-power transmitters were originally intended to "provide . . . service to areas and populations which are unable to receive satisfactory service by reason of distance or intervening terrain obstructions."[94] Initially, the rules were the same for commercial and NCE broadcasters and essentially limited stations to filling in "white areas" (where no signal was received) adjacent to or within a licensed station's predicted signal contour. Translators and boosters owned and operated by the originating station had to fall within that station's 1 mV/m contour, and had to receive their signal from the originating station via its broadcast signal.[95] It should also be noted that translator and booster facilities were (and are) generally prohibited from originating their own programming.[96] The stated purpose of these facilities was furthering the FCC's mandate to maximize service to each community and efficiently utilize available spectrum. Thus, the primary goal was providing at least some service to all areas, and localism was a secondary issue—in other words, something (in terms of programming) was better than nothing.

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[92] *In re* An Inquiry into the Future Role of Low-Power Television Broadcasting and Television Translators in the National Telecommunications System, *Notice of Inquiry*, 68 F.C.C. 2d 1525, 1525 (1978).

[93] There were 1866 FM translators on the air in December 1990. By June 2001, the number had grown 83%, to 3416. That compares to growth of 54% in full-power NCE FM stations, and just a 37% rise in the number commercial FM stations over the same span. Station totals available at http://www.fcc.gov/mmb/asd/totals/index.html.

[94] *In re* Amendment of Part 74 of the Commission's Rules and Regulations to permit the operation of low-power FM broadcast translator and booster stations, *Report and Order*, 20 Rad. Reg. 2d 1538 (1970).

In 1988, the Commission proposed amending its translator rules so that NCE translators owned and operated by their primary station could use any technical means to distribute programming from the primary station to the translator, including microwave and satellite.[97] The stated purpose was to increase opportunities for NCE FM service to unserved and underserved areas. As a result, several NCE stations began building substantial networks of translators, delivering programming via satellite. Many of these operations covered regions far beyond the coverage area of the primary station; indeed, some translator networks have national designs.[98]

Thus, there is the appearance of contradictory actions by the Commission when faced with similar questions about the feasibility and efficiency of low power broadcasting: restricting access to low power FM facilities in the name of spectrum integrity when those stations are licensed to local entities and locally programmed (Class D), while subsequently encouraging rampant growth of low power FM facilities that are prohibited from originating their own programming (translators). Even some in the NCE community who had opposed Class D stations and argued for loosening the delivery rules for translators began to recognize concerns that further changes could harm localism.[99]

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[95] *Id.* Translators owned by entities other than the primary station could be located beyond the 1 mV/m contour. *Id.*

[96] *Id.* The exceptions are identification, local emergency warnings, and 30 seconds per hour of solicitation or acknowledgement of financial support from the local community. 47 C.F.R. §§1231 (f)(g).

[97] In re Amendment of Part 74 of the Commission's Rules to Provide for Satellite and Terrestrial Microwave Feeds to Noncommercial FM Translators, *Second Report and Order*, 7 F.C.C. Rcd 5546 (1992)[*hereinafter* Translator Changes]. Independently owned translators were still restricted from delivery means other than over-the-air in 1988. However, the 1992 rulemaking eliminated most restrictions on delivery for them as well. *Id.*

[98] The American Family Association, headed by Rev. Donald Wildmon and headquartered in Tupelo, MS is one example, with a target of 500 translators nationwide. In late 1997, AFA had completed more than 250 and had dozens of additional applications pending before the FCC. Dr. Jim McCluskey, Remarks at the National Association of College Broadcasters Annual Convention. (Nov. 15, 1997).

D. Local low power FM returns

In 1998, the Federal Communications Commission requested comments on two petitions[100] proposing a new low power audio broadcast service. Concerns about a lack of diversity in the wake of rapid consolidation in the radio industry following the 1996 Telecommunications Act,[101] a growing number of inquiries from the public about operating a low power station,[102] and to a lesser extent the increasing presence of (and concern about) "pirate radio" operations[103] provided an impetus for the Commission to act quickly. The FCC issued a notice of proposed rulemaking in the spring of 1999.[104] In the notice, the Commission invited comment on a number of overarching issues and potential goals for the service, including: whether LPFM would offer opportunities to potential broadcasters and listeners for which no comparable options existed;[105] whether the service should be restricted to the FM band or particular channels in that band, and whether the service should be commercial or non-commercial;[106] and, finally, whether low power stations should be accorded primary status.[107] The FCC also asked for comment on the appropriate technical parameters for low power stations and other issues (such as the relationship between the new services and existing secondary services[108]) related to three proposed new classes of FM service. Of particular interest within this analytical context, the Commission proposed that LPFM ownership be limited to parties without existing broadcast properties and severely limited the number of LPFM stations one entity would be allowed to own, in the interest of furthering diversity. In addition, the FCC suggested requiring potential licensees to reside within the community.

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[99] Comments of NPR, cited in Translator Changes, *supra* note 97, at 5547. Other broadcast groups also opposed any further loosening of the translator delivery rules.

[100] RM-9208 (in response to a petition for rulemaking in July 1997 from Nickolaus & Judith Legget and Donald Schellhardt, Esq.) and RM-9242 (in response to a petition for rulemaking in February 1998 from J. Rodger Skinner, Jr., President of TRA Communications Consultants). Other requests for a low power audio service were also submitted to the Commission at approximately the same time, although only the Legget and Skinner petitions were assigned rulemakings. Because many of the other proposals were widely circulated via relevant e-mail discussion lists, Usenet newsgroups and the World Wide Web, many respondents also addressed their ideas in comments to the Commission.

[101] "Low-Power Radio: Medium of the Masses," *Digital Beat Extra—Broadcasting*, Feb. 1, 2000. Available online at http://www.benton.org/News/Extra/broad020100.html.

[102] The Commission reported 13,000 requests regarding operation of a low power station in 1998, and reported that the low power "fact sheet" on its web site was receiving more than 1000 hits per month. *In re* Creation of a Low Power Radio Service, *Notice of Proposed Rulemaking*, MM Doc. No. 99-25, at ¶11 [hereinafter LPFM NPRM]. Available at http://www.fcc.gov.

[103] *E.g.*, Michael H. Bader, Anarchy on the Airwaves: The Growing Threat of Pirate Radio, *Radio Ink*, Mar. 30, 1998, at 52.

Under the FCC proposal, each of the following classes would be available for assignments throughout the FM band:

> ***LP1000:*** With a maximum effective radiated power (ERP) of 1000 watts, and a maximum antenna height above average terrain (HAAT) of 60 meters (197 feet), such stations would have a signal radius of just under 9 miles, approximately half the full coverage of a Class A FM station operating at the maximum 6 kilowatts ERP and 100 meters HAAT.[109] These stations would be accorded primary status, meaning they would give and receive the same interference protections as existing primary FM stations, and would operate under most of the existing service rules for FM stations.[110] Given the operating rules and the startup costs that would be

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[104] LPFM NPRM, *supra* note 102.
[105] *Id.*, at ¶10-14.
[106] *Id.*, at ¶15-20.
[107] *Id.*, at ¶21.
[108] *Id.*, at ¶29 and 33.
[109] *Id.*, at ¶23-24.
[110] *Id.*, at ¶28.

associated with these somewhat substantial facilities, the Commission envisioned one of the primary goals of this class as providing easier entry to full broadcasting.

LP100: This proposed class offered maximum facilities of 100 watts ERP and 30 meters (98 feet) HAAT, producing a signal radius of 3.5 miles.[111] This class would operate as a secondary service, and thus, as with current secondary services like translators, LP100 stations would not be subject to protection from interference by primary stations (including LP1000 stations as proposed) although they would be required to protect those stations.[112]

Microradio: The FCC offered a third class as a means of reaching a very limited area at a very low cost. This class would have a maximum HAAT of 30 meters, with an ERP of 1-10 watts, producing a signal radius of 1-2 miles.[113] Similar to LP100, this class would also operate as a secondary service.[114]

Reactions to the proposed rulemaking were predictable. NAB, NPR, and many (probably the vast majority of) existing broadcasters were vehemently opposed to the creation of any new services, and objected to the LP1000 class in particular. The FCC also received thousands of comments from the public in support of the proposed services, many of whom expressed an interest in applying for one of the stations. Moving with surprising speed on a question with potentially complex technical issues,[115] the FCC approved LPFM services of 100 (LP 100) and 10 (LP10) watts in January, 2000[116] and accepted the first applications in May of that year.

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[111] *Id.*, at ¶30.
[112] *Id.*, at ¶31.
[113] *Id.*, at ¶34.
[114] *Id.*, at ¶36.
[115] The FCC was also considering how to transition radio from analog to digital broadcasting at the same time. *In re* Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, *Notice of Proposed Rulemaking,* MM Doc. 99-325. Because the design of the proposed In-Band On-Channel (IBOC) digital system made potential interference an even greater concern, NAB and other industry commenters argued that the Commission should wait to complete the LPFM proceeding until after the work on digital radio was finished.
[116] LPFM Order, *supra* note 3.

The rules for the new service represent a break from the trend of moving service to bigger groups and bigger service areas,[117] and a substantial effort by the Commission to open broadcasting to new owners, to "foster a local, community based service"[118] to further the long-held goal of diversity. No current station owner, or even anybody with other media interests including cable systems and newspapers, is eligible for an LPFM license,[119] nor will the FCC permit time brokerage, local marketing agreements, or other operating agreements that would tend to dilute the ownership restrictions.[120] Licensees (or 75% of the board of an incorporated licensee) must live within 10 miles of the station or have their physical headquarters within that distance.[121] Ownership was restricted to one station during the first two years, in order to foster maximum diversity, before phasing in national caps of five stations at two years into service and 10 stations after three years.[122] No local duopolies would be permitted.[123]

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[117] *In re* Creation of a Low Power FM Service, *Memorandum Opinion and Order on Reconsideration*, 65 Fed. Reg. 67289, Nov. 9, 2000. The FCC recognized that this new service was a significant break from its approach to maximizing spectrum use during the past 20 years. However, the Commission held that changes in the industry warranted a change in policy.

> In the past we have struck the balance in favor of licensing higher powered stations to ensure that large audiences were served. Now, when radio service is widely available throughout the country and very little spectrum remains available for new full-powered stations, we conclude that licensing very low powered stations will fill in the gaps in the spectrum that would otherwise go unused. This will maximize the use of the available spectrum, rather than create the inefficiencies we sought to avoid. In the past, we have declined to authorize low power FM radio broadcast stations because of our concern that they would "preclude the establishment of more efficient, stable, full powered stations." At this time, however, we are creating an LPFM service that is designed to allow small stations to operate where full powered stations cannot. *Id.* at 67294.

[118] LPFM Order, *supra* note 3 at 7619.

[119] *Id.* at 7619-7620. Not surprisingly, this rule was generally opposed only by existing broadcasters. *Id.*

[120] *Id.* at 7620.

[121] *Id.* at 7620-7621.

As the Commission concluded,

> we believe that local roots are particularly important in a noncommercial educational service like LPFM. . . . Indeed, Congress and the Commission have long recognized the unique role played by local entities in providing noncommercial educational programming, and we have favored local entities in providing other noncommercial educational services.[124]

The FCC also noted that many commenters in opposition had cited Bechtel v. FCC[125], in which the court overturned the management integration criterion for mutually exclusive application comparative hearings as arbitrary and capricious. The Commission distinguished the rules here in a number of ways. Most importantly, they noted that Bechtel

> rejected a preference for a particular form of business organization-in which station owners worked more than a certain number of hours per week at their station-that had not been shown to provide superior service even though the preference had been used for many years. The preference for local licensees here, in contrast, rests on our predictive judgment that local entities with their roots in the community will be more attuned and responsive to the needs of that community, which have heretofore been underserved by commercial broadcasters. We believe that local residence should carry particular weight here because we envision LPFM as a uniquely local service designed to serve local community needs. We note that while the court invalidated the integration criterion in the Bechtel decision, it recognized that an applicant who is familiar with the community is likely to be aware of its special needs.[126]

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[122] *Id.* at 7621. The FCC was attempting to balance several issues by reserving the licenses for single, local, new operators during the first two years of availability and permitting then-existing licensees to apply for a handful of still-vacant frequencies later.

> In addition to ensuring the fullest use of LPFM spectrum in the long term, we believe that this tiered system will balance the interests of local entities, which we expect to be the first entrants in this service, and national noncommercial educational entities, which may be interested in additional local outlets to increase their reach and to achieve certain efficiencies of operation. *Id.*

[123] *Id.* at 7621-7622.

[124] *Id.* at 7620.

[125] 10 F.3d 875 (D.C. Cir. 1993).

[126] LPFM Order, *supra* note 46 at 7620.

The FCC went on to note that

> the court was concerned in Bechtel that the integration preference elevated quantitative factors-the number of hours the station owners promised to work at the station-over arguably more important qualitative factors such as broadcast experience and established local residence. In contrast, the community-based requirement that we adopt today does not rest on quantitative factors and is not based on promises of future conduct. Rather, we are adopting a simple, straightforward requirement that applicants be based in the local community. In addition, a primary concern underlying the court's decision was that there was no obligation for a successful applicant in the commercial broadcast service to adhere to its integration proposal, and there was no evidence indicating the extent to which licensees had done so in the past. In contrast, LPFM licenses will not be transferable, so we can be assured that a local entity that is awarded the license will continue to operate the station.[127]

Meanwhile opponents continued to fight the new service, turning from the FCC to allies in Congress and filing suit in Federal court.[128] Legislation was introduced in both the House and Senate to delay and limit the implementation of LPFM. The House passed Rep. Oxley's "Radio Broadcasting Preservation Act"[129] in April 2000. As introduced, the bill would have eliminated the new classes. Although the final version would have still permitted LPFM, it was a highly restricted category. The House bill reinstated third-adjacent protections, prohibited the FCC from changing distance separations without authorization from Congress, and ordered the FCC to conduct a study of interference in a handful of markets.

However, LPFM supporters rallied in the Senate. On that side of Congress, legislation remained bottled up in Committee. Moreover, LPFM proponents found at least a partial ally in Sen. John McCain. McCain introduced compromise legislation[130] that would permit the FCC to proceed on LPFM but required additional interference protections. However, this legislation, too, remained in committee.

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[127] *Id.* at 7621.

[128] Paige Albiniak, "LPFM Battle Lines Drawn," *Broadcasting & Cable*, Feb. 21, 2000, p. 7.

[129] The Radio Broadcasting Preservation Act of 2000 (H. R. 3439). A companion bill, S. 2068, was introduced in the Senate by Sen. Judd Gregg of New Hampshire.

[130] FM Radio Act of 2000, S. 2518. The bill would have appointed the National Academy of Sciences as interference standard setter and require any LPFM found to be interfering with an existing station to cease transmission. Two months later in July, McCain introduced a slight

Congress finally broke the bottleneck with an appropriations bill rider.[131] This provision was similar to an amended version of the Oxley and Gregg bills, requiring the FCC to modify its LPFM rules by reinstating third-adjacent channel separation requirements;[132] prohibiting any unlicensed operator from receiving an LPFM license;[133] and requiring the FCC to analyze through hearings and experimental tests with a small number of LPFM stations to determine whether they would result in harmful interference if not subject to third-adjacent protections, and report the results to Congress.[134]

The FCC addressed these requirements in a Second Report and Order, prescribing third adjacent channel interference protection standards as well as rules for existing LPFM applicants who were affected by the change and wanted to amend the technical characteristics of their application.[135]

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variation, The Low Radio Act of 2000 (S. 2989). In this bill, the FCC had interference oversight authority. This bill also spelled out complaint and enforcement procedures in more detail.

[131] District of Columbia Appropriations Act, 2001, H.R. 4942, §632 (Pub. L. No. 106-553, 114 Stat. 2762 (2000)).

[132] *Id.*, §632(a)(1)(A) and (a)(2)(A).

[133] *Id.*, §632(a)(1)(B). This provision, as subsequently implemented by the FCC, *In re* Creation of Low Power Radio Service, 16 FCC Rcd 8026 (2001), was recently vacated and remanded to the Commission, Ruggiero v. FCC, 278 F.3d 1323 (D.C. Cir. 2002). However, the court left room for the FCC to come back with a "more carefully aimed licensing restriction." *Id.* at 1334.

[134] *Id.*, §632(b)

[135] In re Creation of a Low Power Radio Service, MM Doc. No. 99-25, *Second Report and Order*, adopted March 22, 2001. Available at http://www.fcc.gov. Synopsis published 66 Fed. Reg. 23861 (May 10, 2001).

Applications for the first group of LP 100 licenses were accepted in five short filing windows.[136] The Commission began issuing construction permits in April 2001.[137] The first handful of LPFM stations have been on the air less than a year.[138]

E. Discussion

Where Docket 80-90 generally failed, LPFM may create greater opportunity for access to the media and entry to media ownership, furthering the intended goal of increasing diversity and local programming. For many years now, management of the broadcast spectrum in the U.S. has tended to favor bigger entities covering more territory,[139] usually in the name of spectrum efficiency or flexibility. Yet, some aspects of the LPFM rules suggest that there may be at least a window of opportunity for those who feel un(der)served by contemporary radio.

LPFM is explicitly focused on both new program options for audiences and creating access for new entrants. As put forth by the Commission, LPFM allows tiny operators on a relatively low budget to serve small audiences who may be bound together by culture, interests, and geographical proximity. The eligibility requirements for LPFM are, in some ways, a return of the preferences granted under earlier broadcast licensing schemes; in other ways they extend those preferences by adding actual program requirements to the structural factors. Perhaps most importantly, and in stark contrast to the twenty-year direction of broadcast ownership rules, LPFM licensees cannot have any other media interests and ownership is limited (at least during the original licensing phase) to one LPFM station per licensee. This is the provision that most directly opens the market to additional voices. In addition, there is a preference in the criteria for deciding among mutually exclusive applicants for those that pledge to air at least eight hours a day of locally originated programming.[140] While the Docket 80-90 stations arguably failed to deliver a substantial increase in "local expression" because there was no codified requirement that they provide any local programming, the LPFM stations have a mandate to avoid the temptation to simply turn on the satellite receiver 24/7. In addition, the initial limits on ownership (one license per owner, local residence requirements) will further serve to connect the operators to the community and provide encouragement for maintaining the facility as a local outlet. While not a guarantee, these rules are probably the strongest commitment to localized programming the FCC could make, short of specific programming mandates, and they represent a substantial departure from the FCC emphasis of recent decades on *laissez faire* broadcast regulation. Although they do not guarantee any particular sort of programming in either the short-term or long-term future, the rules for LPFM establish real programming incentives. Moreover, the rules provide local ownership (with close ties to the community of license) that the Commission has long believed is most likely to deliver locally-responsive programming.

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[136] Each of the fifty states, plus the District of Columbia, Puerto Rico, American Samoa, Guam, and the Virgin Islands, were assigned to one of five groups. Each group had a separate one-week filing window. Dates and groups are available online at http://www.fcc.gov/mb/audio/lpfm/prior_lpfm_window_dates.html.

[137] The FCC database lists 239 LPFM construction permits and 8 licensed stations as of March 31, 2002. See http://www.fcc.gov/mb/audio/lpfm/index.html.

[138] According to *Broadcasting & Cable* (March 12, 2002), the FCC has granted 230 LPFM construction permits (CPs). Of those, six were on the air in February 2002. Manuel Roig-Franzia, "Little Guys Get Airtime as Low-Power FM Debuts in Region," *Washington Post*, Feb, 19, 2002, p. A1.

[139] *E.g.*, the multiple increases in ownership caps, locally and nationally; the elimination of Class D FM allocations and raising of the Class A maximum ERP to 6 kw; the change in the translator rules to allow satellite signal delivery from distant originating stations.

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[140] LPFM Order, *supra* note 46 at 7631-7632. Admittedly, it is not clear just how "local" this programming will actually be as a disc jockey playing recorded music from the station's main studio would apparently qualify. However, even in that instance there is at least the opportunity of local announcements or other information of local interest between songs. It is far easier for a locally based person to connect with local listeners than for a disk jockey based hundreds or thousands of miles away to be plugged into the community. Moreover, in a best-case scenario, some programmers may well create a forum for a multitude of local voices. The results will likely vary across a wide range; and even in the case of playing recorded music, some may feature artists or styles not heard on more broad-based stations.

III. Conclusion

If localism has failed as a policy, it had a substantial push from the industry and free-market proponents in Congress and at the FCC who succeeded in pushing a "bigger is better" agenda over the past 20 years. Whether that change has been good for the local audience, or for the national audience, or even for the industry as a whole is hardly clear. What is clear is that those changes dramatically drove the cost of owning an electronic media facility or reaching an audience through those media upward. Moreover, regulatory changes during that time removed nearly all requirements for locally originated programming beyond whatever the licensee might determine was desirable (usually defined as sufficiently economically rewarding). In TV, that seldom extends beyond some news, sports, and commercials; for most radio stations, the commitment is even less.

Admittedly, conditions can vary dramatically between large and small markets, and among stations or groups within a market. While many large market stations and groups achieve operating margins above 40 percent, small market operators often lose money or just scrape by. However, is that the inevitable by-product of a commercial system, the result of disparate operational abilities or of policy choices in Washington, or of some other combination of factors?

Although the many and varied policies intended to promote localism may not have been complete successes, neither have they been unmitigated failures. The factors driving the communications market are complex and as a result, many of the most far-reaching consequences of policy choices are often unintended. As was demonstrated in the discussion of Docket 80-90, any given media policy event does not operate in isolation: concurrent economic events and other policy decisions have a significant impact on the outcome.

The industry now is far more concentrated and, as a result, hostile to small local owners than it was in the mid-1980s. The regulatory climate parallels that of the industry. Into that environment came Low Power FM, a Commission attempt to provide a means of access for new entrants and to restore some local programming. Clearly, it is too soon to tell how effective the LPFM rulemaking will ultimately be. Few of earlier attempts to encourage localism through structural means (while simultaneously deregulating content areas) succeeded in opening up the marketplace to new entrants in the long run because the industries successfully blunted those initiatives. Structural policies that created new opportunities, such as Docket 80-90, failed to live up to their promise for a variety of reasons. The implementation details may have failed to give new entrants enough support to become established. Conflicting simultaneous or subsequent rule changes such as the lifting and removal of many ownership limits made small operators takeover targets. Outside factors such as an inopportune decline in the economy killed startups before they became established. In the case of many 80-90 stations, a combination of all of these factors were at work. Although it is not hard to see where policymakers might have gone wrong in the hindsight, it is a little more difficult to predict the likelihood of future success. Nevertheless, that is the nature of the policy process.

Although content addressing local concerns (locally produced or not) may be a significant issue, it is severable from broader concerns about excessive media concentration and maintaining a vibrant marketplace of ideas. Local content is a type of communication that policymakers should especially try to encourage given its historical and continuing importance to American society. Policy actors need to be clear about the rationales underlying possible policy choices, and adopt appropriate analytical mechanisms for evaluating the range of options. Localism remains a potential and, at least sometimes, desirable path, but policies intended to further local content need to clearly protect that content from the centralizing pressures present throughout the media if they are to succeed. Results in the past indicate that policy that relies solely on structural factors, such as ownership limits, will not be likely achieve localism-friendly results on its own. There are always trade-offs to make but we should encourage a policy process that is flexible enough to incorporate local, regional, and national programming sources, and one that takes content (not just structure) into account. The preferred policy choices should increase the diversity of independent options for producers and audiences by enabling sufficient access for producers and consumers. In the end, this approach still offers some promise of better achieving the long-held goals of diversity and competition through localism.

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